No. -934

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In The

Supreme Court of the United States

October Term, 1991

HOLLIS WATKINS, ALICE HARDEN, AARON HENRY, EDWARD BLACKMON, JR., SAMUEL McCRAY, JACQUELINE HARPER, BEN F. BURKETT, MAC ARTHUR COTTON, and JOHN QUINCY ADAMS, on behalf of themselves and all others similarly situated,

Appellants,

vs.

RAY MABUS, GOVERNOR OF THE STATE OF MISSISSIPPI, MIKE MOORE, ATTORNEY GENERAL OF THE STATE OF MISSISSIPPI, and DICK MOLPUS, SECRETARY OF STATE OF THE STATE OF MISSISSIPPI, members of the State Board of Election Commissioners, MISSISSIPPI DEMOCRATIC PARTY EXECUTIVE COMMITTEE, and REPUBLICAN PARTY EXECUTIVE COMMITTEE,

Appellees,

and THE STANDING JOINT LEGISLATIVE COMMITTEE ON REAPPORTIONMENT OF THE MISSISSIPPI LEGISLATURE, TIM FORD, in his official capacity as Speaker of the House of Representatives; GLENN S. DeWEESE, in his official capacity as President Pro Tempore of the Mississippi Senate; and THE STANDING COMMITTEE OF APPORTIONMENT AND ELECTIONS OF THE MISSISSIPPI HOUSE OF REPRESENTATIVES,

Appellees-Intervenors.

On Appeal From Decisions Of The Three-Judge Court Of The United States District Court For The Southern District Of Mississippi

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QUESTIONS PRESENTED FOR REVIEW

1. Should a three-judge district court utilize as a court-ordered reapportionment plan for interim relief for an unspecified term of office, the plan that the three-judge district court finds is unconstitutionally malapportioned in violation of the one-person one-vote principle of the Fourteenth Amendment's Equal Protection Clause?

2. Does Section 2 of the Voting Rights Act apply to court-ordered reapportionment plans utilized as interim remedies for unconstitutionally malapportioned plans?

3. Do the preclearance requirements of Section 5 of the Voting Rights Act of 1965, as amended, apply to changes in voting prepared and submitted to a local federal district court by political parties and election officials of a covered jurisdiction and adopted, without alteration, by the local federal district court when the voting changes were submitted by the political parties and election officials in response to the district court's instructions that the political parties submit suggested changes to the local district court for use in interim elections?

LIST OF PARTIES

The parties to the proceedings below were the appellants, Hollis Watkins, Alice Harden, Aaron Henry, Edward Blackmon, Jr., Samuel McCray, Jacqueline Harper, Ben F. Burkett, Mac Arthur Cotton, and John Quincy Adams, on behalf of themselves and all others similarly situated; and the appellees, Ray Mabus, Governor of the State of Mississippi, Mike Moore, Attorney General of the State of Mississippi, and Dick Molpus, Secretary of State of the State of Mississippi, members of the State Board of Election Commissioners, Mississippi Democratic Party Executive Committee, and Republican Party Executive Committee; and appellees-intervenors the Standing Joint Legislative Committee on Reapportionment of the Mississippi Legislature, Tim Ford, in his official capacity as Speaker of the House of Representatives; Glenn S. DeWeese, in his official capacity as President Pro Tempore of the Mississippi Senate; and the Standing Committee of the Apportionment and Elections Committee of the Mississippi House of Representatives.

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REFERENCE TO OFFICIAL OPINIONS BY LOWER COURTS

Appellants seek review, on direct appeal, of adverse decisions and orders denying preliminary injunctive relief rendered by a three-judge district court for the Southern District of Mississippi on August 2, 9, and 30, 1991. The decisions and orders denying preliminary injunctive relief are unreported and are set out in full in the Appendix, at pages App. 1-56. The August 2, 1991 Order is set out in full at App. 1-7. The August 9, 1991 Order is set out in full at App. 8-52. The August 30, 1991 Order is set out in full at App. 53-56.

STATEMENT OF THE GROUNDS FOR INVOKING JURISDICTION

This is a direct appeal from orders denying preliminary injunctions issued by a three-judge district court for the Southern District of Mississippi on August 2, 1991; August 9, 1991; and August 30, 1991. The three-judge district court was convened pursuant to 28 U.S.C. § 2284 and 42 U.S.C. § 1973c to decide the constitutionality of the Mississippi legislative reapportionment plan and to decide issues raised under §§ 2 and 5 of the Voting Rights Act of 1905, as amended, 42 U.S.C. § 1973c. Appellants filed a timely notice of appeal in the United States District Court for the Southern District of Mississippi on August 6, 1991, and an amended notice of appeal on September 9, 1991. Jurisdiction was invoked in the district court

pursuant to 28 U.S.C. §§ 1331, 1343, and 2284, and 42 U.S.C. § 1973c. The jurisdiction of this court is invoked pursuant to 28 U.S.C. §§ 1253 and 2284 and 42 U.S.C. § 1973c. This court has jurisdiction of this appeal. *N.A.A.C.P. v. New York*, 413 U.S. 345, 353-356 (1973); *Chapman v. Meier*, 420 U.S. 1, 13-14 (1975); *Allen v. Board of Elections*, 393 U.S. 544, 560 (1969); *Florida Lime & Avocado Growers, Inc. v. Jacobsen*, 362 U.S. 73, 75-85 (1960); *Cascade Natural Gas Corp. v. El Paso Natural Gas Co.*, 386 U.S. 129 (1967).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution, 28 U.S.C. § 2284, and 42 U.S.C. §§ 1973 and 1973c. The texts of these constitutional and statutory provisions are set out in App. 163-167.

STATEMENT OF THE CASE

The Mississippi Legislature, in 1982, reapportioned its 122 single-member House and 52 single-member Senate districts. The reapportionment plan received administrative preclearance on November 22, 1982 and has remained in effect since then. There are approximately 20 split precincts in House election districts and 4 split precincts in Senate election districts under this plan.

On January 30, 1991, the Legislature adopted criteria for use in legislative reapportionment in 1991.[1] After 1990 census data was made available, the Joint Committee drafted and the Legislature adopted House and Senate reapportionment plans on April 30, 1991 and submitted those to the United States Attorney General for § 5 review. The Attorney General entered a timely objection to the plans on July 2, 1991. Appellants, plaintiffs below, on June 28, 1991, instituted the instant action in federal district court challenging the new (1991) apportionment plan for not being precleared and the 1982 apportionment plan for being unconstitutionally malapportioned[2] and

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[1] The Legislature, by statute, delegated the responsibility of drafting a legislative reapportionment plan to the Standing Joint Legislative Committee on Reapportionment. It was this committee that adopted the criteria for reapportionment on January 30, 1991. The criteria, as adopted was: (1) to maintain an overall range of maximum population deviations of less than 10%; (2) not to dilute black voting strength; (3) to avoid a political gerrymander; (4) to create contiguous districts; (5) to achieve compact districts "to the extent possible consistent with constitutional and legal standards"; (6) "consistent with other constitutional and legal requirements, the district boundaries should cross governmental or political boundaries the least number of times possible"; (7) county lines should be preserved, if possible, but if they are fractured, then "election district lines should be followed as nearly as possible"; and (8) contests between incumbents should be avoided and the cores of districts should be preserved. (App. 147-148).

[2] The total range of deviation, under the 1982 plan, for House districts is 110.24% and 42.31% for Senate districts. Forty-two (42) House and fourteen (14) Senate districts exceed 10% deviation. The ratio of the population of the largest House district to the smallest is 1.82 to 1, and the largest Senate district to the smallest is 1.51 to 1. All parties essentially admitted, and the district court found, that the 1982 legislative districts are unconstitutionally malapportioned.

dilutive of Afro-American voting strength.[3] Jurisdiction was invoked, in the district court, pursuant to 28 U.S.C. §§ 1331, 1343, and 2284, and 42 U.S.C. §§ 1973c and 1973j(f).

On July 3, 1991, one day after the Attorney General objected to the 1991 legislative reapportionment plan, appellants amended their complaint to specify the Attorney General's objection, and they filed a motion for a preliminary injunction grounded in the one person-one vote principle of the Fourteenth Amendment's Equal Protection Clause and § 5 of the Voting Rights Act of 1965, 42 U.S.C. § 1973c. Basically, appellants asserted that an injunction should issue against the 1991 reapportionment plan because it had not been precleared and against the 1982 apportionment plan because it was unconstitutionally malapportioned. (App. 150-153). A three-judge district court was constituted on July 10, 1991. The court

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[3] Appellants alleged, and proved, that the 1982 apportionment plan results in discrimination against black voters in violation of § 2 of the Voting Rights Act of 1965, as amended, 42 U.S.C. § 1973, (App. 93, 97-121), and was unconstitutionally malapportioned. (App. 10-11). Appellants asserted that the 1982 plan could not be utilized as an interim remedy for the same malapportioned 1982 plan. Irrespective of that proof, the district court adopted the 1982 plan as an interim remedy for the same 1982 malapportioned plan. The three-judge district court clearly had jurisdiction of the constitutional challenge raised by appellants, *Sixty-Seventh Minnesota State Senate v. Beens*, 406 U.S. 187, 195 (1972) (per curiam); *Chapman v. Meier*, 420 U.S. 1, 13-14 (1975). When that court imposed a remedy that was violative of the constitution and § 2 of the Voting Rights Act of 1965, 42 U.S.C. § 1973, this Court has jurisdiction, on direct appeal, to decide the controversy. *Florida Lime & Avocado Growers, Inc. v. Jacobson*, 362 U.S. 73, 75-85 (1960).

entered an order on July 15, 1991 enjoining the candidate qualification deadline; allowing the United States to participate, as amicus curiae, and two legislative (House) committees to intervene as defendants; ordering "all parties" to "submit to the court proposed redistricting plans, memoranda, affidavits and other supporting papers" by July 24, 1991 for the court to use as an interim remedy for the unconstitutionally malapportioned plan; and scheduling a hearing "on the proposed plans" to begin Monday, July 29, 1991. (App. 14-15).

Appellants filed four (4) Senate and five (5) House apportionment plans on July 24, 1991[4]. All of those plans

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[4] Appellants Senate reapportionment plans were:

SENATE PLANS

Ex. No.	Deviation	No. of Blk dists.	Dists 65% Black
Ex. 1	4.46%	13 Black majority	12
Ex. 2	4.43%	13 Black majority	11
Ex. 3	2.85%	13 Black majority	11
Ex. 4	8.66%	13 Black majority	9

There were no split precincts in appellants' Senate plans Exhibits 1, 2, and 3. Appellants' Senate plan Exhibit 4 contained two (2) split precincts. Exhibit 4 was a "least change" plan from the April 30, 1991 legislative plan which reflected state policy choices with respect to reapportionment.

Appellants' expert witness on minority vote dilution, Dr. Allan Lichtman, testified that a district needed to contain a black population of about 65% and a black voting age population of 60% in order for black voters to be afforded an opportunity to elect candidates of their choice. (App. 97-121).

(Continued on following page)

were superior to the 1982 legislative apportionment scheme. Although appellants were prepared to offer testimony on all of their plans as a remedy for the unconstitutionally malapportioned 1982 plan, the district court forbade them to do so. Because the court felt it was under severe time constraints, the court restricted appellants to designating only one House and one Senate plan as a remedial plan. Appellants chose to offer their "least change" plans as an interim remedy since those plans embodied the state policy choices on reapportionment and satisfied the requirements of the United States Constitution and the federal Voting Rights Act. The only other party to file a plan on July 24, 1991 as a remedial plan was the Standing Joint Legislative Committee on Reapportionment. That Committee filed one House plan and one Senate plan as remedial plans. Both of those plans were superior to the 1982 plan in effect.

(Continued from previous page)

Appellants' House reapportionment plans were:

HOUSE PLANS

Ex. No.	Deviation	No. of Blk Dists.	Dists. 65% Blk
Ex. 5	6.28	40 Black majority	30
Ex. 6	2.97	39 Black majority	29
Ex. 7	2.98	40 Black majority	31
Ex. 8	Statistics incomplete		
Ex. 9	Statistics incomplete		

Appellants subsequently filed a corrected Exhibit 8, appellants' "least change" House plan, which had a population deviation of slightly more than 10%.

The district court appointed two expert witnesses to analyze the designated plans (one plan per house per party). Their analysis was limited to population deviation; black majority districts (ranges of 50% to 54.99%, 55% to 59.99%, 60% to 64.99%, and 65% and above); districts lacking compactness apparently due to political or racial reasons; House districts containing two or more counties; and split counties (Senate only), precincts, and municipalities.[5]

Trial on a court-ordered interim remedy commenced on July 30, 1991. On July 29, 1991, appellants filed a motion seeking a preliminary injunction under § 2 of the Voting Rights Act against the use of the existing 1982 apportionment scheme as an interim remedy because it diluted black voting strength. Appellants proved, without peradventure, that the 1982 apportionment scheme discriminated against black voters by diluting black voting strength. (App. 97-121). During the course of the trial, appellants and the Joint Committee reached a settlement on a House plan to be used as an interim remedy and the House Apportionment and Elections Committee (the "House Committee") filed appellant's July 11, 1991 plan

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[5] The district court's order directing the analysis was seriously flawed. It did not list all of the state policy affecting reapportionment. The court reassigned the importance of certain criteria the Legislature had assigned. [See fn. 1, supra]. For instance, the Legislature recognized that compact districts should be created where "possible consistent with constitutional and legal standards." (App. 147-48). Non-dilution of black voting strength was a primary legislative criteria and legal standard. The district court held that non-dilution was not a criteria for an interim plan. (App. 45).

as the Committee's plan. The district court instructed the court-appointed experts to analyze the July 11, 1991 plan and the settlement plan within the same limited framework that the designated plans were analyzed.

After the court appointed experts presented their reports, and after county election officials testified concerning matters that could assist them in conducting the elections smoothly, the district court found the designated plans to be unacceptable on grounds other than constitutional and statutory considerations.

During the testimony of the election officials, counsel for the State Democratic Party Executive Committee informed the court that the political parties were responsible for conducting the primary elections scheduled for September 17, 1991. The following Colloquy occurred between Judge Barksdale and Mr. Warren, counsel for the State Democratic Party Executive Committee.

JUDGE BARKSDALE:

> It would be very helpful for the court for the parties to submit to us by tomorrow the language you would like to see in an order concerning these time savers, et cetera.

MR. WARREN:

> We'll be happy to provide that, your Honor.

MR. MOORE:

> I don't think there's anything else.

JUDGE BARKSDALE:

> If the executive committees could work with the Attorney General, with the State Election Commission, and give us that in just one submittal, obviously that's all the better. So –

MR. WARREN:

> We have already made inquiry with the Attorney General's office and Secretary of State's office, and there's some specific statutes that would be affected and we're going to address or we'll be pleased to do that. We'll be happy to do that.

(Transcript of Proceedings, July 31, 1991, pp. 53-54).

After this exchange, Mr. Warren asked Mr. Will Colom, one of Appellants' counsel, if he had any suggestions that the political parties needed to consider in presenting a proposed order to the district court. Mr. Colom made several specific suggestions which he thought would lessen the likelihood of voters not having their ballots counted in legislative races. Appellants had made it known earlier that they did not want legislative elections held under the 1982 scheme. Appellants had insisted, throughout the litigation, that they preferred elections held under a court-ordered or court-adopted plan which complied with the dictates of the Fourteenth and Fifteenth Amendments to the United States Constitution and §§ 2 and 5 of the Voting Rights Act.

Mr. Colom wrote a list of suggested voting changes for the Democratic Party Executive Committee for incorporation into the party's proposed order to be offered to the court. Those changes were: (1) that the requirements

of § 23-15-627, Miss. Code Ann. (1972), be relaxed so that a request for absentee ballots and envelopes could be made over the telephone by the individual desiring to vote by absentee, a neighbor, family member, or the request could be made in writing; (2) the requirements of § 23-15-627, 631, 639, and 685, Miss. Code Ann. (1972), be relaxed so that the application for absentee ballot and the ballot itself could be mailed to the absentee voter at the same time in the same envelope; (3) the requirement of § 23-15-631(c), Miss. Code Ann. (1972), be relaxed so that absentee ballots can be counted if received by mail prior to 5:00 P.M. on election day; (4) that the requirements of § 23-15-637, Miss. Code Ann. (1972), be relaxed so that absentee voters may vote in person at the Circuit Clerk's office until noon on the day preceding the election; (5) on election day, if a voter showed up at the wrong polling place, then the election workers must call to locate the proper precinct for the voter; and (6) that election workers offer an affidavit ballot to anyone whose name is not on the poll book and inform the voter that he or she may vote by affidavit ballot. (App. 85). The Democratic Party Executive Committee, through its attorney, gave the handwritten list to the State Secretary of State's office for review. (App. 83). The Secretary of State's office "made notations concerning potential difficulties in implementing some of Mr. Colom's suggestions." (App. 83). The Secretary of State's office noted that only two of the proposed suggestions would not "pose any significant difficulties in implementation." (App. 83). Those were: (1) absentee ballots that arrived at the clerk's office on election day would be counted, and (2) absentee electors could vote at the clerk's offices until noon on the day

preceding the election. (App. 83). Those notations were then given to the attorney for the Democratic Party Executive Committee. (App. 84). "[T]he Mississippi Democratic Party Executive Committee, after consultation with the Mississippi Republican Party Executive Committee and the State Defendants" . . . submitted the "proposed language to be included in the [district court's] order adopting a plan for legislative elections" to the district court. (App. 78). The proposed language contained the following voting changes: (1) changing the candidate qualification deadline for legislative elections from July 19, 1991 to August 12, 1991; (2) allowing the political party executive committees until August 15, 1991 to make sample ballots available instead of July 29, 1991; (3) allowing absentee voters until 12:00 noon September 16, 1991 to vote in person at the clerks' offices instead of 12:00 noon September 14, 1991; (4) allowing absentee ballots to be received by mail until September 17, 1991 at 5:00 P.M. instead of September 16, 1991 at 5:00 P.M.; (5) allowing absentee ballots to be printed on a form and size different from the regular official ballot; and (6) allowing the use of paper ballots for legislative elections where voting machines will be used for other elections. (App. 78-79).

The district court incorporated the voting changes requested by the political parties and state election officials into its August 2, 1991 Order Concerning Legislative Elections, without any alteration. (App. 5-7). The specific voting changes urged by the election officials and adopted, without alteration, by the district court were: (1) changing the candidate qualification deadline from July 19, 1991 to August 12, 1991; (2) allowing the political

party executive committees until August 15, 1991 to make sample ballots available; (3) allowing absentee voters until 12:00 noon September 16, 1991 to vote in person at the clerks' offices; (4) allowing absentee ballots to be received by mail until September 17, 1991 at 5:00 P.M.; (5) allowing absentee ballots to be printed on a form and size different from the regular official ballot; (6) and allowing the use of paper ballots for legislative elections where voting machines will be used for other elections. (App. 5-7). The district court adopted, without any modification, the voting changes urged by the state election officials. Those voting changes had the potential for discrimination.[6]

Appellants filed a motion requesting the district court to stay the legislative primary elections scheduled

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[6] Appellants requested voting changes that made it easier for all citizens to vote in the legislative elections. Generally, more white citizens vote by absentee ballot than Afro-American citizens. (App. 87). Black citizens in Mississippi still suffer, socioeconomically, from lingering effects of racial discrimination. (App. 137-139, 97-121). Those socioeconomic disparities affect voter participation rates and the levels of participation by the races. (App. 97-121). The voting changes suggested by appellants with respect to poll workers calling to find out what precinct voters, who showed up at the wrong precincts, should vote in would have benefited black voters. The voting change appellants suggested that poll workers permit voters who showed up at the wrong polls to vote by affidavit ballot would have benefited black voters. Why did the election officials not want those particular voting changes incorporated into the court order concerning elections? Could it have been that the election officials only wanted voting changes implemented that benefited white voters? Those were the only voting changes, suggested by appellants, that the election officials sought to incorporate into the court order. Those changes, standing alone, had the potential for discrimination.

for September 17, 1991 under the 1982 malapportioned and discriminatory apportionment scheme. The district court denied the motion, and appellants filed an application for a stay of the district court judgment with this Court. On August 20, 1991, this Court denied appellants' application for a stay and injunction pending appeal. (App. 57).

On August 26, 1991, appellants filed a motion for preliminary injunction under § 5 of the Voting Rights Act seeking to enjoin the district court's August 2, 1991 Order because it contained voting changes drafted by the political parties and election officials and the changes had not been precleared. (App. 157). The district court entered an order on August 30, 1991 denying appellants' motion stating that the "order provides *interim relief* . . . and the order does not reflect the "policy choices of . . . elected representatives." (App. 53-56).

Appellants filed a notice of appeal from the district court's August 2, 1991 Order on August 6, 1991, and they filed an amended notice of appeal from the district court's orders of August 2, 9, and 30, 1991 on September 9, 1991. (App. 140-145).

ARGUMENT I

A three-judge district court should not utilize as a court-ordered reapportionment plan for interim relief for an unspecified term of office the plan that the three-judge district court finds is unconstitutionally malapportioned in violation of the one-person one vote principle of the Fourteenth Amendment's Equal Protection Clause.

It is now settled that the Fourteenth Amendment's Equal Protection Clause requires substantial population equality in legislative districts. *Reynolds v. Sims*, 377 U.S. 533, 568 (1964). "Substantial population equality" means the total range of population deviation in legislative districts should not exceed 10%. *Brown v. Thomson*, 462 U.S. 835 (1983); *Board of Estimates v. Morris*, 489 U.S. 688 (1989). "A plan with larger disparities in population, however, creates a prima facie case of discrimination and therefore must be justified by [the] state," *Brown v. Thomson*, supra at 842-43, "or other acceptable considerations." *Chapman v. Meier*, 420 U.S. 1, 24 (1975).

The district court found that the deviations present in the instant case (110% in the House and 42% in the Senate) constituted unconstitutional malapportionment. (App. 50). The State did not attempt to justify the malapportionment. In fact, the State, in their Answer and in their Response to appellants' motion for a preliminary injunction challenging use of the malapportioned plan agreed that an injunction should issue. Only the district court offered what it considered as "other acceptable considerations", not as a justification for the malapportioned plan as a permanent plan, but as justification for

use of the malapportioned plan as a remedy for the same malapportioned plan. The district court found, as "other acceptable considerations", that time did "not permit [the district] court to fashion its own plan," . . . "the interests of the voters mandate holding elections on time," and the plans designated by the parties (one plan per house per party) were unacceptable. (App. 31, 32-51). As shown below, the reasons advanced by the district court for not enjoining use of the malapportioned scheme for the conduct of elections conflict with clear precedent established by this court as well as with the decisions of other courts.

This Court, in an opinion announced by Justice White, held that "[w]here a constitutional violation has been found" the remedy must be "tailored to cure the condition that offends the Constitution." *Rogers v. Lodge*, 458 U.S. 613, 628 (1982). After all, "the court has not merely the power but the duty to render a decree which will so far as possible eliminate the discriminatory effects of the past as well as bar like discriminations in the future." *Louisiana v. United States*, 380 U.S. 145, 154 (1965). To that end, district courts "should not, in the name of state policy, refrain from providing remedies fully adequate to redress constitutional violations which have been adjudicated and must be rectified." *White v. Weiser*, 412 U.S. 783, 797 (1973). The district court's opinion and orders below contravene these well settled principles. Below, the district court found that the 1982 apportionment scheme was unconstitutionally malapportioned and ordered, as a remedy for the unconstitutional plan, the very plan itself. Not only did the malapportioned 1982

plan discriminate against all voters in general, it discriminated against Afro-American voters in particular.[7] This Court has started that where "discriminatory treatment" of a protected class is unconstitutionally impermissible, interim remedial relief is required. *Mahan v. Howell*, 410 U.S. 315, 332 (1973). And, this Court has instructed district courts that:

> Whenever a district court is faced with entering an interim reapportionment order that will allow elections to go forward it is faced with the problem of 'reconciling the requirements of the Constitution with the goals of state political policy' . . . An appropriate reconciliation of these goals can only be reached if the district court's modifications of a state plan are limited to those necessary to cure any constitutional or statutory defect. Thus, in the absence of a finding that the

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[7] The district court ordered use of the malapportioned plan as a remedy for the malapportioned plan. Appellants argued that the malapportioned plan diluted black voting strength in violation of § 2 of the Voting Rights Act, 42 U.S.C. 1973, and could not be used as an interim remedy. The district court, in reliance on *Chisom v. Roemer*, 853 F.2d 1186, 1188-89 (5th Cir. 1988), *rev'd on other grounds*, ___ U.S. ___, 111 S.Ct. 2354 (1991), held that it "need not reach the issue of the 1982 plan's invalidity under § 2, because [the district court was] utilizing the 1982 plan only for interim relief." (App. 45-46). To the extent that *Chisom v. Roemer*, supra, provides authority for the district court to utilize a plan, as an interim remedy, that violates § 2, that authority clearly conflicts with the holding of the Eleventh Circuit Court of Appeals in *Edge v. Sumter County School Dist.*, 775 F.2d 1509, 1510 (11th Cir. 1985) ("the district court could not validly adopt a reapportionment plan without determining whether the plan complied with Section 2 of the Voting Rights Act, as amended, 42 U.S.C. § 1973").

> Dallas County reapportionment plan offended either the Constitution or the Voting Rights Act, the District Court was not free, and certainly was not required, to disregard the political program of the Texas State Legislature.[8]

Upham v. Seamon, 456 U.S. 37, 43 (1982) (per curiam).

Under clear Supreme Court precedents as well as precedents from the court of appeals, the district court should not have utilized the unconstitutionally malapportioned 1982 scheme, even for interim elections. And, the district court, clearly, should not have permitted those elected under the unconstitutional plan to hold office for

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[8] The district court, in the instant case, "disregarded the political program of the" Mississippi State Legislature. The Legislature had adopted, as a policy, criteria that any apportionment scheme not exceed 10% maximum deviation and any apportionment scheme adopted not dilute black voting strength. See fn. 1, supra. The district court's adoption of the 1982 apportionment scheme clearly disregarded this express Legislative criteria and policy. No Supreme Court decision "suggests that differences of this magnitude [variations of 30% for senate districts and 40% for house districts] will be approved without a satisfactory explanation grounded on acceptable state policy." *Swann v. Adams*, 385 U.S. 440, 444 (1967). The district court did not offer a satisfactory explanation grounded on acceptable state policy for ordering implementation of the malapportioned 1982 apportionment scheme as a remedy for the same scheme. The court attempted to articulate a state policy of having legislative elections every four years as scheduled. However, state policy with respect to holding legislative elections is that the "legislature may change the day and date of general elections to any day and date in October, November or December." Art. 12, § 252 Miss. Const. (1890). The election could have been rescheduled for any day in October, November or December, 1991.

an indefinite term.[9] The term of office for legislators elected under a malapportioned plan should be limited in duration and a new election compelled. *Keller v. Gilliam*, 454 F. 2d 55 (5th Cir. 1972). The "interim plan [shall] remain in effect for no longer time than is necessary to

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[9] The district court held that the legislators elected under the unconstitutional scheme should "hold office until their successors are elected" under a precleared or court-ordered permanent plan. (App. 5). Although the court, in a subsequent opinion, indicated that the legislators elected to office would not serve "a full four-year term," (App. 50), this was pure dicta and contradictory to the earlier order. In any event, the district court did not specify how many years the new term of office would be. Would it be one, two, three, four or more years? (App. 88-91). The district court indicated its reluctance to order special elections because those elections "would lead to a lower voter turnout and extra expenses for the State . . . " (App. 36). The court further stated that not to "hold the elections on September 17 and November 5 would have an unacceptable adverse impact on the citizens of Mississippi." (App. 36). Since, special elections were out of the question, then future legislative elections, under a permanent plan, would be held on regular election dates. The next regular statewide election is the Presidential Preference Primary on Super Tuesday in March, 1992. § 23-15-1081, Miss. Code Ann. (1972). If no reapportionment plan is precleared or court-ordered by then, the next regular statewide election date is June, 1994. § 23-15-1031, Miss. Code Ann. (1972). Consider, for example, that the Legislature fails to obtain preclearance of a plan and the district court conducts a hearing in October, 1992 and adopts a faulty plan. The case is appealed to this Court and the elections are stayed. The Case is reversed and remanded in 1993. The lower court conducts a hearing after remand and adopts another faulty plan. A stay is obtained in that case on appeal. And, the case is reversed in June 1994. It is possible that no court-ordered or precleared plan could be in place for the 1994 elections.

adopt a permanent plan." *Burns v. Richardson*, 384 U.S. 73, 85 (1966). To allow an unconstitutional interim plan to remain in effect for up to four years is unconscionable.

Since this question addresses whether it is proper to use malapportioned plans that dilute minority voting strength, as an interim remedy for a malapportioned plan, the question is substantial. And, to the extent that the district court's order contravenes precedents established by this court, as well as conflicts with related decisions in other circuits, the question presented herein is substantial and probable jurisdiction should be noted.

ARGUMENT II

Section 2 of the Voting Rights Act does apply to court-ordered reapportionment plans utilized as interim remedies for unconstitutionally malapportioned plans.

This Court has held that an interim court-ordered apportionment plan should comply with "the Voting Rights Act." *Upham v. Seamon*, supra at 43. This holding is consistent with the decision by at least one court of appeals that any interim reapportionment plan should comply "with Section 2 of the Voting Rights Act." *Edge v. Sumter County School Dist.*, supra at 1510. The district court, here, held that § 2 of the Voting Rights Act does not apply to interim court ordered plans. This holding is contrary to clear precedent and particularly disturbing. If this ruling is allowed to stand and is adopted by other lower federal courts, then § 2 of the Voting Rights Act could be eviscerated after each federal census. Any state legislature intent on not remedying racial vote dilution problems in apportionment schemes could use the lower

court's ruling as a shield to a valid attack on a racially discriminatory apportionment scheme. Under the court's ruling, the legislatures, even in the face of severely malapportioned and racially discriminatory apportionment schemes, could sit back and not attempt to apportion itself. Any aggrieved voter who challenged the malapportioned scheme in federal court, in the face of imminent elections, would be denied any affirmative relief for interim elections. The federal courts would, in effect, be aiding the recalcitrant legislatures. As Justice Stevens, writing for the Court, has recognized:

> if covered jurisdictions could avoid the normal preclearance procedure by awaiting litigation challenging a refusal to redistrict after a census is completed, the state might have the unintended effect of actually encouraging delay in making obviously needed changes in district boundaries.

McDaniel v. Sanchez, 452 U.S. 130, 151 (1981).

Inasmuch as the district court ruled that § 2 of the Voting Rights Act of 1965 does not apply to interim court-adopted or court-approved apportionment schemes, the ruling has the potential for nationwide application. Therefore, the question presented herein is substantial.

ARGUMENT III

The preclearance requirements of Section 5 of the Voting Rights Act of 1965, as amended, do apply to changes in voting prepared and submitted to a local federal district court by political parties and election officials of a covered jurisdiction and adopted, without alteration, by the local federal district court when the voting changes were submitted by the political parties and election officials in response to the district court's instructions that the political court's parties submit suggested changes to the local district court for use in interim elections.

The political parties and state board of election commissioners submitted explicit voting changes to the district court with a request that the court incorporate the changes into its order scheduling elections.[10] Any voting changes "reflecting the policy choices of the elected representatives of the people – no matter what constraints have limited the choices available to them – the preclearance requirement of the Voting Rights Act is applicable." *McDaniel v. Sanchez*, supra at 153. Section 5's

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[10] The district court found "the parties including plaintiffs -- were permitted to make suggestions to the court regarding provisions of the court's order . . . " (App. 55). This finding is clearly erroneous. As the record clearly indicates, the court invited the political parties and state board of election commissioners to suggest "the language [the political parties and state election commissioners] would like to see in an order concerning" the elections. (Transcript of Proceedings, July 31, 1991, pp. 53-54). Any changes appellants desired had to be made to one of the political parties or the state election commissioners. It was the political parties and election commissioners who decided whether or not they wanted to incorporate any of appellants' suggestions into their own.

preclearance requirements apply "to all entities having power over any aspect of the electoral process within designated jurisdictions." *Dougherty County, Georgia Board of Educ. v. White,* 439 U.S. 32, 42 (1978). Mississippi is a designated jurisdiction. *Hathorn v. Lovorn,* 457 U.S. 255, 265 n. 16 (1982). And, "political parties . . . to the extent they are empowered by the state to conduct primary elections . . . , are subject to § 5. *Hawthorne v. Baker,* 750 F. Supp. 1090, 1094 (M.D. Ala. 1990) (three-judge court); 28 C.F.R. § 51.7. In Mississippi, political parties are given primary responsibility for conducting primary elections, § 23-15-291, et. seq., Miss. Code Ann. (1973). Even if political parties urge a federal district court, during the course of litigation, to implement certain voting changes drafted and presented to the court for ratification, the voting changes still must be precleared. *Hathorn v. Lovorn,* supra at 265 n. 16 (§ 5 applies to court decrees effectuating changes).

The question presented herein is substantial. If political parties could wait until litigation is pending and then urge the courts to effectuate changes, even those with the potential for discrimination, then § 5 of the Voting Rights Act would be seriously weakened. That Act was intended by Congress to "protect Negroes against a dilution of their voting power." *Perkins v. Matthews,* 400 U.S. 379, 390 (1971). To the extent the district court held, in its opinion, that the political parties and state board of election commissioners were not "the elected representatives" of the people within the meaning of § 5, that decision conflicts with clear precedent in the Eleventh Circuit Court of Appeals. *Hawthorne v. Baker,* supra.

CONCLUSION

Because the three-judge district court rendered a decision which conflicts with many clear precedents of this court as well as courts within other circuits, and on the basis of the foregoing facts and authorities, appellants request that this Court note probable jurisdiction, stay and enjoin the partisan primary and general elections scheduled for September 17, and November 5, 1991, or, in the alternative set those elections aside, and reverse and remand the orders and decisions of the district court appealed herein with specific instructions to the district court.

Dated: September 16, 1991

Respectfully submitted,

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IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI
JACKSON DIVISION

HOLLIS WATKINS, ET AL. PLAINTIFFS

VERSUS CIVIL ACTION NO. J91-0364(L)

RAY MABUS, GOVERNOR OF THE STATE OF MISSISSIPPI, MIKE MOORE, ATTORNEY GENERAL OF THE STATE OF MISSISSIPPI, and DICK MOLPUS, SECRETARY OF STATE OF THE STATE OF MISSISSIPPI, Members of the STATE BOARD OF ELECTION COMMISSIONERS, MISSISSIPPI DEMOCRATIC PARTY EXECUTIVE COMMITTEE, and MISSISSIPPI REPUBLICAN PARTY EXECUTIVE COMMITTEE

DEFENDANTS

THE STANDING JOINT LEGISLATIVE COMMITTEE ON REAPPORTIONMENT OF THE MISSISSIPPI LEGISLATURE; TIM FORD, In His Official Capacity As Speaker of the House of Representatives; GLENN S. DEWEESE, In His Official Capacity as President Pro Tempore of the Mississippi Senate; and THE STANDING COMMITTEE OF APPORTIONMENT AND ELECTIONS OF THE MISSISSIPPI HOUSE OF REPRESENTATIVES

INTERVENOR DEFENDANTS

ORDER CONCERNING 1991 ELECTIONS FOR MISSISSIPPI LEGISLATURE

(Filed Aug. 2, 1991)

On June 28, 1991, plaintiffs filed this action challenging Mississippi's current legislative apportionment (1982 plan), as well as that enacted by the Mississippi Legislature in 1991 (1991 plan), seeking injunctive and other relief under §§ 2 and 5 of the Voting Rights Act of 1965, as amended, 42 U.S.C. § 1973, *et seq.*, and the Fourteenth and Fifteenth Amendments to the United States Constitution. The complaint was amended on July 3, 1991, to incorporate the letter of July 2, 1991, by which the United States Attorney General, pursuant to § 5 of the Voting Rights Act, 42 U.S.C. § 1973c, interposed an objection to the 1991 plan. Because of that objection, the 1991 plan can not be used. Miss. J.R. No. 4 at p. 27 (1991) and Miss. J.R. No. 202 at p. 19 (1991); 42 U.S.C. § 1973c.

The primary and general elections for the Mississippi Legislature are scheduled for September 17 and November 5, 1991, respectively; and plaintiffs seek, among other things, to have those elections held on schedule under a court-ordered, or court-approved, plan, with the persons elected to hold office for a regular four-year term, or a shorter term set by this court.

Holding the 1991 legislative elections on schedule is not only the request of several other parties, including the Democratic and Republican Party Executive Committees, but is also one of the areas of primary concern to this court, which acts in this case as a court of equity and must fashion an appropriate remedy, on an extremely

expedited basis, against a backdrop of competing concerns and interests, including those of the voters in Mississippi.

This three-judge court was constituted on July 10, 1991, pursuant to 28 U.S.C. § 2284. The qualifying deadline for the 1991 elections was July 19, 1991. Accordingly, as noted, this matter has been handled on an expedited basis, as a result of this and the other exigent circumstances. Pursuant to a hearing on July 15, 1991, and an order of that date, the July 19 qualifying deadline was enjoined, subject to further order of this court. Among other things, a status conference was held on July 22, a pretrial conference on July 26, and a status conference on August 2, 1991.

Proposed apportionment plans were submitted by various parties on July 24, 26, 27, 29 and 30, 1991; and the court-appointed expert witnesses analyzed, filed reports on, and testified about plans submitted by the plaintiffs, the Joint Committee, the House Committee, and a plan for the House agreed on by the plaintiffs and the Joint Committee.

At the referenced August 2 status conference, the court again urged counsel to attempt to reach a settlement for both chambers of the Mississippi Legislature. Minutes before court was to commence on August 2 (3:30 p.m.), counsel for plaintiffs advised that a settlement had been reached for the House. In court, counsel for the plaintiffs, the Joint Committee, and the House Committee, announced that a completed settlement agreement, in the form of a plan, would not be ready for 48 hours; that if problems developed in reaching settlement, there was

no binding arbitrator. And, counsel again advised the court that no agreement had been reached for the Senate, nor did it appear that one would take place. Counsel for both political parties urged that the court take action today, so that the elections could be timely held; that if there was an agreement on the House, it should be completed today. That is not possible. Furthermore, it is inequitable to the candidates and voters, among others, to further delay the election process. Moreover, with settlement only on the House, but not the Senate, this would not remove the possible necessity for special elections for the Senate.

Based upon the testimony, documentary evidence (including the proposed plans), memoranda, and oral argument, including that received during the hearings in this action on July 15 and July 29-August 1, 1991, and for the reasons to be more fully discussed in the opinion to be hereinafter filed, this court both finds, as a matter of fact, and holds, as a matter of law, that none of the plans submitted by the parties can be utilized for the 1991 legislative elections. Furthermore, there is insufficient time for this court to prepare and adopt its own plan and still hold the 1991 legislative elections. Therefore, at present, this equity court can award only interim relief. Accordingly, the relief requested by plaintiffs is GRANTED in part and DENIED in part, as follows.

Judge Lee would have permitted the parties to this action the additional 48 hours which they requested in order that they might determine whether the House plan to which they have agreed in principle does in fact represent a settlement which the computer-generated documentation will support and which the court could

approve. He concurs in the court's order insofar as it relates to the Senate.

IT IS, THEREFORE, ORDERED:

1. The apportionment plan to be utilized for the September 17 primary election and November 5 general election for the Mississippi Legislature will be the apportionment plan now in effect (1982 plan), Miss Code Ann. § 5-1-1, *et seq.*, which was submitted to the United States Attorney General for preclearance, pursuant to § 5 of the Voting Rights Act, 42 U.S.C. § 1973c, and became effective on November 22, 1982, when the United States Attorney General did not, within the prescribed 60-day period, interpose an objection to the plan, as advised by a letter of November 22, 1982, on behalf of the United States Attorney General. 1982 Miss. Laws ch. 306 § 1; ch. 305, § 1.

2. The qualifying deadline for the 1991 legislative elections is Monday, August 12, 1991, at 5:00 p.m.

3. Those persons elected pursuant to 1991 legislative elections shall hold office until their successors are elected under an apportionment plan which complies with the Voting Rights Act and the United States and Mississippi Constitutions. That plan will be effected either by (a) a legislative plan, precleared by the United States Attorney General or approved by a three-judge court in the District of Columbia, 42 U.S.C. § 1973c, or (b) ordered by this court.

4. This court retains jurisdiction of this action. Further proceedings will take place as ordered, including, but not limited to, the following:

a. On February 14, 1992, the parties are to submit nominees, including their qualifications, for appointment as a special master, pursuant to Fed. R. Civ. P. 53. The parties have through February 28, 1992, to file objections to those nominees.

b. A status conference will be held in this action on March 2, 1992, at 1:30 p.m.

5. Solely for the September 17 primary election for the Mississippi Legislature, and because of the extended qualifying deadline, the following changes to certain election procedures shall be in effect:

a. the Democratic and Republican Party State Executive Committees shall mail or otherwise make available official sample ballots to their respective county executive committees in accordance with their customary practices, no later than Thursday, August 15, 1991. Those sample ballots will be utilized by the county executive committees without revision.

b. Qualified absentee voters shall be allowed to vote at their respective circuit clerk's office until 12:00 noon on Monday, September 16, 1991.

c. Absentee ballots mailed to the circuit clerk shall be accepted and counted if they are received by mail in the office of the circuit clerk on or before 5:00 p.m. on September 17, 1991.

d. In order to allow absentee ballots to be mailed at the earliest possible date, the circuit clerks may print absentee ballots in a form or size which is different from the regular official ballot, provided that the absentee

ballots are in the same order of arrangement as the regular official ballot.

e. If necessary, voting may be by paper ballots, with the paper ballots to be used in combination with the voting devices utilized for the conduct of all other elections on September 17. This order does not authorize the use of paper ballots for other elections scheduled for September 17, 1991.

6. If further similar changes in election procedures are necessary for the September 17 primary election for the Mississippi Legislature, they shall be requested forthwith on motion to United States District Judge Tom S. Lee, the managing judge in this action.

SO ORDERED, this the 2nd day of August, 1991.

/s/ Rhesa H. Barksdale
RHESA H. BARKSDALE
UNITED STATES
CIRCUIT JUDGE

/s/ Tom S. Lee
TOM S. LEE
UNITED STATES
DISTRICT JUDGE

/s/ Charles W. Pickering, Sr.
CHARLES W. PICKERING, SR.
UNITED STATES
DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI
JACKSON DIVISION

HOLLIS WATKINS, ET AL. PLAINTIFFS

VERSUS CIVIL ACTION NO. J91-0364(L)

RAY MABUS, GOVERNOR OF THE STATE OF MISSISSIPPI, MIKE MOORE, ATTORNEY GENERAL OF THE STATE OF MISSISSIPPI, and DICK MOLPUS, SECRETARY OF STATE OF THE STATE OF MISSISSIPPI, Members of the STATE BOARD OF ELECTION COMMISSIONERS, MISSISSIPPI DEMOCRATIC PARTY EXECUTIVE COMMITTEE, and MISSISSIPPI REPUBLICAN PARTY EXECUTIVE COMMITTEE

DEFENDANTS

THE STANDING JOINT LEGISLATIVE COMMITTEE ON REAPPORTIONMENT OF THE MISSISSIPPI LEGISLATURE; TIM FORD, In His Official Capacity As Speaker of the House of Representatives; GLENN S. DEWEESE, In His Official Capacity as President Pro Tempore of the Mississippi Senate; and THE STANDING COMMITTEE OF APPORTIONMENT AND ELECTIONS OF THE MISSISSIPPI HOUSE OF REPRESENTATIVES

INTERVENOR DEFENDANTS

(August 9, 1991)

Before BARKSDALE, Circuit Judge, LEE and PICKERING, District Judges.

PER CURIAM:

As noted in this court's orders of August 2 and 8, 1991, this opinion provides the bases for those orders. The August 2 order concerns the 1991 elections for the Mississippi Legislature being held on schedule. The August 8 order denies plaintiffs' motions to stay the August 2 order and enjoin the elections, pending appeal of the August 2 order.

Challenging Mississippi's current legislative apportionment (1982 plan), as well as that adopted by the Mississippi Legislature in 1991, plaintiffs seek injunctive and other relief under §§ 2 and 5 of the Voting Rights Act of 1965, as amended, 42 U.S.C. § 1973, *et seq.*, and the Fourteenth and Fifteenth Amendments to the United States Constitution. The primary and general elections for the Mississippi Legislature are scheduled for September 17 and November 5, 1991, respectively; and plaintiffs seek, *inter alia*, to have those elections held under a court-ordered, or court-approved, plan, with the persons elected to hold office for a regular four-year term, or a shorter term set by this court.

For the reasons stated below, and as ordered on August 2, 1991, the requested relief is **GRANTED IN PART** and **DENIED IN PART**.

By motions on August 5 and 6, plaintiffs moved to stay the August 2 order and enjoin the elections, pending

their appeal of the August 2 order. As ordered on August 8, 1991, those motions are **DENIED.**

I.

In 1982, the Mississippi Legislature adopted its present apportionment, with 122 districts for the House and 52 for the Senate. Miss. Code Ann. § 5-1-1, et seq. Pursuant to § 5 of the Voting Rights Act, 42 U.S.C. § 1973c, the 1982 plan was submitted to the United States Attorney General for preclearance and became effective on November 22, 1982, when the United States Attorney General did not, within the prescribed 60-day period, interpose an objection to the plan. 1982 Miss. Laws ch. 306 § 1; ch. 305, § 1. Accordingly, the elections for the Mississippi Legislature in 1983 and 1987 were held pursuant to that plan. Under the § 1982 plan, there are approximately 20 split precincts for the House plan and 4 for the Senate plan.

According to the 1990 census, the State of Mississippi has a total population of 2,573,216, of whom 1,633,461 are white (63.48%), and 915,057 are black (35.56%). Therefore, for a 122 member House and 52 member Senate, each House and Senate district ideally should contain 21,092 and 49,485 persons, respectively. Accordingly, based upon the number of persons now residing in the 1982 plan districts, the existing districting scheme (the 1982 plan) for the House has a total population deviation from the norm of 110.124%, with district 58 being overpopulated by 55.81% and district 51 being underpopulated by 54.43%. Likewise, the Senate now has a total population

percentage variation from the norm of 42.31%, with district 30 being overpopulated by 24.92% and district 22 being underpopulated by 17.39%.

In November 1979, Mississippi amended Article 13, § 254 of its Constitution to provide for reapportionment following the decennial census.[1] Although the

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[1] Article 13, § 254 provides in part:

> The legislature shall at its regular session in the second year following the 1980 decennial census and every ten (10) years thereafter, and may, at any other time, by joint resolution, by majority vote of all members of each house, apportion the state in accordance with the constitution of the state and of the United States into consecutively numbered senatorial and representative districts of contiguous territory. The senate shall consist of not more than fifty-two (52) senators, and the house of representatives shall consist of not more than one hundred twenty-two (122) representatives, the number of members of each house to be determined by the legislature. Should the legislature adjourn, without apportioning itself as required hereby, the governor by proclamation shall reconvene the legislature within thirty (30) days in special apportionment session which shall not exceed thirty (30) consecutive days, during which no other business shall be transacted, and it shall be the mandatory duty of the legislature to adopt a joint resolution of apportionment. Should a special apportionment session not adopt a joint resolution of apportionment as required hereby, a five-member commission consisting of the chief justice of the supreme court as chairman, the attorney general, the secretary of state, the speaker of the house of representatives and the president pro tempore of the senate shall immediately convene and within one

(Continued on following page)

Mississippi Legislature was not required by § 254 to reapportion the Legislature until 1992 ("second year following the 1980 decennial census and every ten (10) years thereafter"), the Legislature, as noted above, reapportioned itself in 1991, the year after the census. Miss. J. R. No. 4 (1991) and Miss. J. R. No. 202 (1991). The defendant Standing Joint Legislative Committee on Reapportionment of the Mississippi Legislature (Joint Committee), instead of the Mississippi Attorney General, was charged with submitting the 1991 plan to the United States Attorney General for § 5 review, with the resolutions providing that until the plan was precleared, it did not become law. The submission was completed on June 24, 1991.

By letter of July 2, noting expedited review of the submission, the United States Attorney General interposed an objection, addressing several illustrative aspects in the plan that caused him to find that the State had not met its burden of showing that the plan was free of a racially discriminatory purpose. However, he "note[d] at the outset that the proposed districting plans for both the House and the Senate appear to have no retrogressive effect within the meaning of Section 5. Both plans maintain or expand the number of districts in which minority

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(Continued from previous page)

hundred eighty (180) days of the adjournment of such special apportionment session apportion the legislature, which apportionment shall be final upon filing with the office of the secretary of state. Each apportionment shall be effective for the next regularly scheduled elections of members of the legislature.

voters usually will be able to elect legislators of their choice. . . . "

Based on his analysis of the legislative proceedings leading to adoption of the 1991 plan, the Attorney General stated that "currently black citizens do not have an equal opportunity to elect candidates of their choice to either the Mississippi House or Senate." He was unable to say that the plan was free of any racially discriminatory purpose, finding "that reasonably compact and contiguous districts could be drawn in a number of additional areas of the State in which black voters usually would be able to elect representatives of their choice." The Attorney General stated that he could not "ignore the substantial indications in the materials and information available to us . . . that support for the [1991 plan] and opposition to alternative suggestions were sometimes characterized by overt racial appeals." The Attorney General concluded:

> We are mindful that the regularly scheduled elections for the Mississippi House and Senate are fast approaching. We understand that for elections to go forward under a plan which satisfies both the legitimate concerns of the Mississippi Legislature and the requirements of federal law will require a concerted effort. Please be assured that this Department stands ready to cooperate in every way, including providing review under Section 5 on an exceptionally expedited basis so that the scheduled elections might be held with a legally enforceable plan under the existing schedule.

Between submission of the 1991 plan and the Attorney General interposing his objection, plaintiffs filed this

action, challenging both the 1982 and 1991 plans. Named as defendants were Mississippi's Governor, Attorney General, and Secretary of State – the members of the State Board of Election Commissioners (State Defendants); the Mississippi Democratic Party Executive Committee (Democratic Party); and the Mississippi Republican Party Executive Committee (Republican Party). Plaintiffs amended the complaint to incorporate the July 2 objection by the United States Attorney General.

On July 10, the Joint Committee, the Speaker of the Mississippi House and the President Pro Tempore of the Mississippi Senate moved to intervene; and intervention was allowed *ex parte*. Plaintiffs on July 12 moved the court to reconsider that intervention; and the court did so on July 15, when it, among other things, considered the July 12 motion to intervene by the Standing Committee on Apportionment and Elections of the House of Representatives (House Committee). (As discussed *infra*, that Committee's apportionment plan for the House had failed by a vote of 64 to 58. Among other things, it had the support of all 20 black members of the House.)

By order on July 15, this court noted that "reapportionment is primarily the duty and responsibility of the State through its legislature or other body, rather than of a federal court", *citing McDaniel v. Sanchez*, 452 U.S. 137, 138 (1981), and emphasized that sufficient time remained for the Governor of Mississippi to convene a special session of the Legislature and for a new plan passed by that special session to be precleared by the United States Attorney General.[2] This court then, *inter alia*, (1) enjoined

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[2] The Mississippi Legislature meets annually in regular session beginning on the Tuesday after the first Monday of

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the July 19, 1991, qualifying deadline; (2) allowed the Joint Committee to remain as a defendant; (3) allowed the House Committee to intervene as a defendant; (4) allowed the United States to participate as *amicus curiae;* (5) ordered the parties on or before July 19, 1991, to submit recommendations for a special master or a court-appointed expert witness; and (6) ordered that, if the Mississippi Legislature did not enact and have a new plan precleared, (a) the parties on or before July 24, were to submit proposed redistricting plans, memoranda, affidavits and other supporting papers, including a statement concerning the propriety *vel non* of injunctive relief, (b) the United States on or before July 26, was to file any response to the proposed plans, and (c) a hearing was to be held on Monday, July 29.

A July 18 order scheduled a status conference for July 22, including provision for the parties to participate if desired, and a pretrial conference for July 26.

Following the July 22 status conference, the parties on July 24 filed those items ordered on July 15, including proposed plans and memoranda. The State Defendants,

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January for a period of 90 calendar days, except that the regular session which begins on every fourth year after 1972 runs for a period of 125 calendar days. **Miss. Const.** art. 4, § 36. In the spring of 1991, the immediately preceding regular session of the Mississippi Legislature adjourned until the Tuesday after the first Monday of January 1992 "unless sooner convened by the Governor" of Mississippi. *Id.* "The governor shall have the power to convene the legislature in extraordinary session whenever, in his judgment, the public interest requires it." **Miss. Const.** art 5., § 121.

the House Committee, and the Democratic and Republican Parties did not file separate plans. The Joint Committee filed a plan (July 23 plan) that consisted of the plan the Legislature passed (April 30 plan) with modifications to cure the Attorney General's objections. Plaintiffs submitted several plans on July 24, and were allowed additional time to submit additional plans. At the pretrial conference on July 26, and pursuant to pretrial and court-appointed expert witness orders for the July 29 hearing, discussed at the conference and entered following it, the plaintiffs were directed to designate the plan for each chamber that they desired the court-appointed expert witnesses to review, with their designated House plan to be filed on or about 5:00 p.m. on Friday, July 26, and their Senate plan on or about 10:00 a.m. on Saturday, July 27.[3] The court-appointed expert witness order stated, pursuant to agreement by the State Defendants and House Committee, that those plans so designated by plaintiffs were adopted by the State Defendants and the House Committee. The pretrial order also provided that the July 29 hearing would concern, *inter alia*, whether elections were to be timely held, including whether under the 1982 plan, and the length of term of office pursuant to such elections.

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[3] Plaintiffs contend that their designated plan for the House (July 26 least change plan) offered the minimum number of changes from the April 30 plan that would cure the Attorney General's objections. Likewise, they offered their Senate plan (July 27 least change Senate plan) as a plan with changes from the legislatively-approved plan designed to cure the § 5 objection.

The expert witness order, discussed and agreed to at the pretrial conference, directed the court-appointed experts to: (1) comment on the objections by the United States Attorney General to the 1991 plan and the extent to which the July 23 Joint Committee plan cured those objections; and (2) analyze the July 23 plan submitted by the Joint Committee and the designated plan to be submitted by plaintiffs (on their behalf and on behalf of the State Defendants and House Committee) on the following bases – population deviation; black majority districts (ranges of 50% to 54.99%, 55% to 59.99%, 60% to 64.99%, and 65% and above); districts lacking compactness apparently due to political or racial reasons; House districts containing two or more counties; and split counties (Senate only), precincts and municipalities.

Pursuant to the schedule set by the expert witness order, the experts provided their reports to counsel on Sunday, July 28, subsequent to counsel for the Joint Committee and plaintiffs advising the court late that afternoon that they were close to settlement on the House plan and were negotiating the Senate plan.

At the start of the July 29 hearing, plaintiffs announced that they and the Joint Committee had reached settlement on the House plan and were close to settlement on the Senate plan, with only districts 20 (in Madison County) and 22 (in Washington County) still in dispute. The Department of Justice announced that plans submitted to it that day could be reviewed by Thursday, and if they were agreed plans, the review could take place more quickly. However, the House Committee then announced that it had not adopted the plan submitted by plaintiffs on July 26 and that it had not taken part in the

July 27-28 negotiations. The Democratic Party made no announcement; the Republican Party stated that it had no objection to the settlement of the House plan and wanted the elections to be held on schedule, with the candidates being elected to a four year term. The State Defendants did not make an announcement; and the Court recessed until 1:00 p.m., to allow the parties to attempt to reach settlement on plans for both chambers.

When Court reconvened, the Mississippi Attorney General, for the State Defendants, stated that they, like the House Committee, had, in fact, not adopted the plans submitted by the plaintiffs on July 26 and 27 and were uneasy about the proposed settlement. Among other things, the Attorney General noted concern expressed to him by the circuit clerks over split precincts. The plaintiffs then advised again that the plaintiffs and the Joint Committee had reached agreement on a House plan; but for the Senate, they could not reach agreement because of one district in dispute in the Delta that plaintiffs wanted as a black majority district. They indicated that negotiations over that district necessarily involved negotiations over adjoining districts. Moreover, although the Joint Committee and plaintiffs stated that they had reached settlement, their agreement was not in a form ready for submission to the United States Attorney General, but simply reflected the black majority districts on which they had agreed. The House Committee then interposed another objection to the House plan the plaintiffs had submitted and served on July 26, noting that the certificate of service for that plan did not reflect service on the House Committee.

The court advised the parties of its great, and ever increasing, concern, in light of the fast approaching elections and numerous conflicts among the parties, including the defendants, and noted the numerous administrative tasks to be completed before the primary election, as well as items of other, and greater significance, such as voter confusion. It observed that the Democratic Party had stated that the qualifying deadlines should be no later than August 9. The court reiterated, as it had in the pretrial order, that the only option under the circumstances might be to hold the elections under the 1982 plan; and court was recessed until the next day (July 30), to allow the parties further time to attempt to reach settlement. The plaintiffs then filed a motion for a preliminary injunction against use of the 1982 plan.

On July 30, the plaintiffs reported that they had prepared in map and statistical form the agreement on the House reached in principle with the Joint Committee (the July 29 House plan). The Joint Committee estimated that the July 29 House plan was substantially equivalent – approximately 70% to 75% – to the plan the Mississippi Legislature passed. However, the State Defendants and House Committee stated again that they were not in agreement on that July 29 plan.[4] The House Committee

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[4] In commenting on the course of negotiations over the July 29 plan, the parties offered conflicting reports. In contrast to the House Committee stating that it had not taken part in, or agreed to, the July 29 House plan, the plaintiffs contended that members of the House Committee had participated in the negotiations. The plaintiffs also maintained that they had reached an agreement on the Senate on July 29 but that they could not locate the person(s) with whom they had agreed.

urged the court to adopt its plan (July 11 plan), a modification of the above noted alternate plan that the House had failed to pass by a vote of 64 to 58 during the regular legislative session. The United States estimated that if the July 29 House plan were submitted that day (Tuesday) for preclearance, the Attorney General could render a decision by Thursday (August 1). The plaintiffs and Joint Committee indicated that no agreement had been reached on the Senate, but that there were only one or two districts still in dispute.

The court encouraged the parties to continue settlement discussions; it advised, however, that, regardless of the progress the parties made toward settlement, its order establishing a scheme for the 1991 elections would be issued on August 2. It submitted the July 11 and July 29 plans to the court-appointed experts for review, based on the criteria outlined in the July 26 expert witness order, and directed them to testify about the various plans on the following day (July 31). It likewise requested that the parties offer election officials' testimony concerning the problems associated with conducting elections on an abbreviated schedule. The court again stressed that the only viable alternative might be to conduct interim elections for one year, utilizing the 1982 plan.

Also on July 30, plaintiffs offered the testimony of Dr. Allan J. Lichtman, who opined that, in order for black citizens in Mississippi to elect representatives of their choice, they would need to vote in a district with a black population of 68.5% and a black voting age population greater than 60%.[5] Dr. Lichtman agreed that voter

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[5] Dr. Lichtman qualified his analysis by stating that the required black population and voting age population

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turnout, especially for voters of a lower socioeconomic status, was likely to be less in special elections than in regularly scheduled elections, and that longer campaigns are more helpful to voters with less access to information and few economic resources.

In the hearing on July 31, the parties indicated that they had not reached a settlement on either the House or the Senate to which all parties could agree. The only firm agreement was the July 29 House plan between the Joint Committee and the plaintiffs. The court-appointed experts – Hoyt T. Holland, Jr.,[6] and William J. Little, Jr. – testified regarding their analysis of the April 30 legislative plan, the July 23 Joint Committee plan, the plaintiffs' July 26 (House) and 27 (Senate) plans, the July 11 House Committee plan and the July 29 (House) settlement plan. They identified the number of districts for each plan that "lack[ed] compactness to the extent that it appears that

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percentages vary from county to county and that the data also varies for blacks under age 25. He likewise indicated that a smaller black majority is needed in urban areas than in rural parts of Mississippi in order for black voters to have an equal opportunity to elect candidates of their choice. His testimony on socioeconomic disparities between whites and blacks in Mississippi was primarily based on data accumulated as of 1984. However, in 1988, for example, the Mississippi Legislature enacted laws to make voting registration easier.

[6] On July 29, the day after the experts issued their original reports, the plaintiffs moved to strike Holland's report on the grounds that Holland was unqualified and biased. Following voir dire of Mr. Holland and argument by plaintiffs on July 31, the motion was denied.

the District was drawn to achieve, without being malapportioned, either a political or racial result." Neither could state that the proposed plans cured the Attorney General's objections based on discriminatory purpose. Little testified that the July 29 settlement plan did not go further than the July 23 Joint Committee plan in curing the Attorney General's objections, except possibly in the Leflore County districts. Little indicated that, in general, the considerable changes effected by the July 29 plan with respect to the July 23 plan did not appear to be based on concerns for improving minority representation.[7]

Both Holland and Little identified as a defect in the 1991 (April 30) plan the fact that it included groups of persons, such as university student populations, within the districts, who do not normally vote in those districts.

Little did not offer a judgment as to which plan was best, although he did note that the July 11 plan had a lower deviation than the July 29 plan and that it better promoted minority representation.

Holland indicated that he would require 3 or 4 days to draw his own redistricting plan for the Legislature, assuming that the court provided him with criteria, such as the number of black majority districts the plan should contain. Little testified that he would need 3 to 6 weeks

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[7] Little noted that the Joint Committee's July 23 plan lowered the percentage deviation with respect to the April 30 plan. In doing so, it approximately doubled the number of split precincts. Little suggested that it would be easier to draw a legislative redistricting plan once the county supervisors' districts – currently in the process of being reconfigured – are redrawn because it would be necessary to split fewer precincts.

for each chamber to draw a plan, depending on the difficulty of the criteria the court supplied him. This estimate did not include time for input from the public or the parties.

Also testifying on July 31 were several circuit clerks from various legislative districts in Mississippi who described the considerable logistical problems involved in conducting elections with a delayed qualifying deadline. They also testified that conducting elections with a large number of split precincts would significantly complicate the voting process. Henry Kirksey testified as to disparities in education and income between black and white voters in Mississippi. And, Janiki Hall offered expert testimony in support of the plaintiffs' July 27 least change Senate plan.

On August 1, Representative, and plaintiff, Ed Blackmon, a member of the Joint Committee, the House Committee, and the Black Caucus,[8] testified in favor of plaintiffs' July 26 least change plan for the House. Blackmon testified that, during the legislative session, black legislators had struck a bargain with 38 other representatives to support the alternate plan that failed on the floor of the House. The 58 representatives agreed that black members would receive the maximum number of black majority districts possible and would not become involved in the partisan, political fight over the next House speaker. Blackmon criticized the activities of the

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[8] The Black Caucus is composed of the 20 black members of the Mississippi House and the two black members of the Mississippi Senate.

House Committee and Joint Committee during the legislative session, stating that there were "no clean hands in this." He testified that, subsequent to the Legislature's adjournment, power politics had motivated the changes in the two plans originally before the Legislature; he indicated that the Joint Committee and House Committee had each endeavored to protect those who supported their respective plans. He also noted that compactness in drawing the districts had not been honored.

The State Defendants, the Republican Party, the Democratic Party, and the Joint Committee did not call witnesses. The House Committee offered the testimony of Representative Ayres Haxton, who had worked with Representative Blackmon in creating the alternate plan that was rejected during the legislative session. Haxton testified that Blackmon had insisted on the inclusion of 40 majority black districts in the alternate plan. He outlined the ways in which the July 11 plan (a modification of the alternate plan that lost in the House) attempted to cure seven problem areas raised by the United States Attorney General's objection letter. While Haxton indicated that, in creating the July 11 plan, the House Committee had attempted to pursue a "least change" approach with respect to the plan that failed in the House, he testified that the Committee nonetheless modified 71 districts in order to lower deviations and cure the Attorney General's objections. Haxton testified that the failure of the various proposals to create reasonably compact districts was due in part to political considerations, rather than merely attempts to maximize the number of black majority districts.

At the request of some parties, additional time was given during the hearing on August 1 to reach settlement. Settlement was not reached, and oral argument was presented the afternoon of August 1.

Late in the morning on August 2, the court held another status conference, in which it urged counsel to attempt to reach a settlement for both chambers of the Mississippi Legislature. Three minutes before court was to commence at 3:30 p.m. that day, plaintiffs advised that a settlement had been reached for the House. However, in court, plaintiffs, the Joint Committee, and the House Committee announced that a completed settlement agreement, in the form of a plan, would not be ready for 48 hours; and that if problems developed in reaching settlement, there was no binding arbitrator. And, counsel again advised the court that no agreement had been reached for the Senate, nor did it appear that one would be reached. The State Defendants repeated their desire that the elections be held on schedule. And, counsel for the executive committees for both political parties urged that the court take action that day, so that the elections could be timely held; that if there was an agreement on the House, it should be dictated into the record and completed that day. However, it was not possible for the settlement to be entered in a form that would clarify the points on which the parties had agreed; and this court concluded that it would be inequitable to the candidates and the voters, among others, to further delay the election process. Moreover, with settlement reached only on the House, but not on the Senate, special elections for the Senate would still be necessary.

Thereafter, the court entered its August 2 order, which provided in part:

> 1. The apportionment plan to be utilized for the September 17 primary election and November 5 general election for the Mississippi Legislature will be the apportionment plan now in effect (1982 plan), Miss. Code Ann. § 5-1-1, et seq., which was submitted to the United States Attorney General for preclearance, pursuant to § 5 of the Voting Rights Act, 42 U.S.C. § 1973c, and became effective on November 22, 1982, when the United States Attorney General did not, within the prescribed 60-day period, interpose an objection to the plan, as advised by a letter of November 22, 1982, on behalf of the United States Attorney General. 1982 Miss. Laws ch. 306 § 1; ch. 305, § 1.
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> 2. The qualifying deadline for the 1991 legislative elections is Monday, August 12, 1991, at 5:00 p.m.
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> 3. Those persons elected pursuant to 1991 legislative elections shall hold office until their successors are elected under an apportionment plan which complies with the Voting Rights Act and the United States and Mississippi Constitutions. That plan will be effected either by (a) a legislative plan, precleared by the United States Attorney General or approved by a three-judge court in the District of Columbia, 42 U.S.C. § 1973c, or (b) ordered by this court.
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> 4. This court retains jurisdiction of this action. Further proceedings will take place as ordered, including, but not limited to, the following:

a. On February 14, 1992, the parties are to submit nominees, including their qualifications, for appointment as a special master, pursuant to Fed. R. Civ. P. 53. The parties have through February 28, 1992, to file objections to those nominees.

b. A status conference will be held in this action on March 2, 1992, at 1:30 p.m.

5. Solely for the September 17 primary election for the Mississippi Legislature, and because of the extended qualifying deadline, the following changes to certain election procedures shall be in effect:

a. The Democratic and Republican Party State Executive Committees shall mail or otherwise make available official sample ballots to their respective county executive committees in accordance with their customary practices, no later than Thursday, August 15, 1991. Those sample ballots will be utilized by the county executive committees without revision.

b. Qualified absentee voters shall be allowed to vote at their respective circuit clerk's office until 12:00 noon on Monday, September 16, 1991.

c. Absentee ballots mailed to the circuit clerk shall be accepted and counted if they are received by mail in the office of the circuit clerk on or before 5:00 p.m. on September 17, 1991.

d. In order to allow absentee ballots to be mailed at the earliest possible date, the circuit clerks may print absentee ballots in a form or size which is different from the regular official ballot, provided that the absentee ballots are

in the same order of arrangement as the regular official ballot.

e. If necessary, voting may be by paper ballots, with the paper ballots to be used in combination with the voting devices utilized for the conduct of all other elections on September 17. This order does not authorize the use of paper ballots for other elections scheduled for September 17, 1991.

6. If further similar changes in election procedures are necessary for the September 17 primary election for the Mississippi Legislature, they shall be requested forthwith on motion to United States District Judge Tom S. Lee, the managing judge in this action.

On August 5 and 6, plaintiffs moved to stay the August 2 order and enjoin the elections, pending appeal of the order. The State Defendants, House Committee and Republican Party filed responses in opposition to the motions. The motions were denied on August 8.

II.

As the parties recognize, the 1991 plan is not in issue; because it has not been precleared, it has no effect. 42 U.S.C. § 1973c. This was, among other things, recognized by the resolutions adopting the 1991 plan. Miss. J.R. No. 4 at p. 27 (1991) and Miss. J.R. No. 202 at p. 19 (1991).

The Legislature bears first responsibility for reapportioning itself and should be given time to enact a plan of reapportionment. *E.g., Wise v. Lipscomb,* 437 U.S. 535, 539-40 (1978); *Chisom v. Roemer,* 853 F.2d 1186, 1192 (5th Cir. 1988), *rev'd on other grounds,* ___ U.S. ___, 111 S. Ct.

2354 (1991). The Legislature having failed to do so, however, we are called upon to decide whether the elections will be held; and if so, whether under a plan adopted by the court, under a plan submitted by one of the parties, or under the existing districting scheme (1982 plan).

In this instance, this court operates as a court of equity. *E.g., Whitfield v. Democratic Party of State of Ark.*, 890 F.2d 1423, 1432-33 (8th Cir. 1989) (citing 1982 U.S. Code Cong. & Admin. News 208). We are charged with fashioning interim relief pending later legislative or, if necessary, judicial action. *See Monroe v. City of Woodville, Miss.*, 819 F.2d 507, 511 n.2 (5th Cir. 1987), *cert. denied*, 484 U.S. 1042 (1988). We proceed to consider the alternatives available to us for holding elections and to balance the equities for and against the adoption of each.

A.

Before addressing either the propriety of a court-drawn plan or adopting a plan proposed by one of the parties, we note the troubling political winds that have unfailingly roared through the courtroom at every turn of this litigation. Needless to say, these have an adverse bearing on any plan that this court could either fashion or adopt. They can not be ignored. They are a warning light for any plan.

Shifting alliances among some parties consistently made a resolution by settlement difficult, if not impossible. One factor that deterred negotiation is the disagreement by the House Committee and the State Defendants, represented by the Mississippi Attorney General, with

the plaintiffs, with whom they were formerly in agreement, as noted above. As noted, at the hearing on July 15, the House Committee stated its disagreement with the Joint Committee concerning the plan for the House. The April 30 plan for the House passed the House by a close vote of 64 to 58; it became apparent at the hearings that this split was, among other things, part of the ongoing contest for Speaker of the House – a pure political controversy, that can be given no consideration by this court. But, as noted, it sounds an alarm.

And, as indicated at the hearing commencing July 29, the alliance between the plaintiffs and the State Defendants and House Committee came to an abrupt end at or about the time of the July 26-27 negotiations, which took place principally between the Joint Committee and the plaintiffs. Another alarm sounded loud and clear.

Likewise, another controversy vividly outlined by the hearings is the ongoing dispute between the Mississippi Legislature and the Mississippi Attorney General.[9] For example, the Mississippi Attorney General made it clear that the State Defendants had no input in the negotiations following the submission of the 1991 plan to the United States Attorney General. This, again, is another political controversy which, like the dispute between the Joint Committee and the House Committee – with the plaintiffs moving from one side to the other, has no bearing in this court. We note again only that these disputes, among other things, have precluded a possible

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[9] This is, in part, reflected by the fact that the Joint Committee, not the Mississippi Attorney General, made the submission of the 1991 plan to the United States Attorney General.

settlement of this action on the Senate side and made it impossible to create a House plan in map and statistical form that would have facilitated a genuine agreement among the parties. A genuine settlement on the two houses might have resulted in a plan that the United States Attorney General could have precleared and that this court could have adopted.

And, as noted, these disputes have enlightened the court, to say the least, on the need for even more than the usual detailed, painstaking and cautious fact finding in fashioning or adopting a plan.

1.

However, time does not permit this court to fashion its own plan. To do so would require considerable proof, as well as drawing districts after the proof was received and considered. In order to develop a fair plan, we would need to receive input from all the parties and from the public. Because we find that the interests of the voters mandate holding elections on time, we conclude that we lack sufficient time to conduct full hearings and use a special master to draw plans that take into account the diverse interests at stake in this litigation. For example, in order for this court to fashion a plan, we would have to furnish to the master or court-appointed expert the criteria to be used in developing new districts. Time does not permit this court to develop the proper criteria. To do so, we would need to establish a baseline black voting age population figure for use in shaping majority black districts. Testimony adduced at the hearing demonstrated that it would be improper to use the same population

percentages state-wide. It would be necessary for this court to receive extensive – and current – proof in order to develop the proper criteria for creating majority black districts in various regions of Mississippi.

As to the alternative of freezing current legislators in office, it would not be fair to the voters, much less the present legislators, to require them to continue to hold office. We are especially concerned over the prospect of denying voters the right to choose the representatives of their choice four years after the last set of legislative elections. Moreover, at the hearing on this matter, most parties agreed that they would prefer on-time elections under *any* plan rather than freezing current legislators in office.

2.

Not having time to draw our own plan, we turn to those proposed by the parties. In starting, we note the concerns expressed by the United States Attorney General in his July 2 objection letter.

Moreover, the reports prepared by the court-appointed experts demonstrate serious problems with the plaintiffs' designated plans (July 26 [House] and July 27 [Senate] plans), the Joint Committee plan (July 23 plan), the plaintiff-Joint Committee settlement plan (July 29 plan), and the plan that originally failed on the House floor, as modified (July 11 plan). And, analysis of the plaintiffs' designated House plan was rendered difficult by the fact that their submitted data were incomplete.[10]

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[10] The plaintiffs' designated House plan lacked precinct data, the omission of which made it difficult for the court-

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For example, viewing the proposed Senate plans, the Joint Committee's has a deviation of 3.14%, but the plaintiffs' July 27 least change plan has a deviation of 8.66%; the Joint Committee's has 26 split precincts, while the plaintiffs' plan has only two. Both plans have districts that are not compact.[11]

The plans submitted by the parties for the House suffer from the same problems. While the Joint Committee plan has a deviation of only 1.97%, the plaintiffs' July 26 least change plan has a deviation of 16.24%.[12] We note that the population deviation in later plans increased over earlier ones as the parties attempted to accommodate political considerations and to create more majority

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appointed expert to calculate population deviation for that plan. Accordingly, plaintiffs revised that submission by providing additional data on August 1.

[11] The Joint Committee's (July 23) proposed Senate District 16 resembles a pinwheel in shape. Senate District 18 lacks compactness: it consists of a rectangular district with a long appendage attached that extends northward. District 29 resembles a barbell, with two groupings of precincts attached by a narrow alley. Districts 37 and 38 are essentially daisy chains of precincts, each with one or more peninsulas of precincts that extend out into adjoining districts.

In the plaintiffs' designated Senate plan (July 27 plan), District 19 resembles a boomerang, with two long groupings of precincts joined at a single point. Plaintiffs' Senate Districts 20 and 37 randomly attach ameoba-like extensions of precincts.

[12] The data plaintiffs submitted on August 1 was to correct this. The July 11 plan has a deviation of 2.98%, and the July 29 plaintiff-Joint Committee settlement plan has a deviation of 9.68%.

black districts. As noted, a number of proposed districts in each of the submitted plans are not reasonably compact.[13] The inclusion of a large number of significantly non-compact districts in all the proposed plans before the court is of great concern; the suggestion, if not expression, of political, not merely racial, jockeying in configuring these districts is patent. The court is reluctant to adopt, even on an interim basis, any of these plans so filled with little disguised political "landmines", as termed by counsel for one of the parties.

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[13] The court-appointed experts testified that the following numbers of districts lacked compactness in the respective plans: July 23 Joint Committee, 15; July 26 plaintiffs' least change, 12; July 11 alternate plan as modified, 18; July 29 plaintiffs-Joint Committee settlement, 20. An examination of the non-compact districts identified in the experts' reports indicates some particularly strangely shaped districts. House District 13 proposed by the Joint Committee resembles a half-oval. The Committee's District 36 contains two masses of precincts connected by a narrow alley. House Districts 47 and 48 in the Joint Committee plan consist of narrow arms shooting out from a reasonably compact center. The plaintiffs' plan (July 26) maintains the same bizarrely configured House District 13. Although it contains fewer non-compact districts than the Joint Committee's proposed House plan, it nonetheless risks confusing voters and fracturing communities of interest by including oddly-configured districts, including House Districts 21, 22, 33, 35, 41, 48, 56, 38, 93, 99, and 107. The July 11 plan contains non-compact districts that consist of octapus-like arms jutting out from a central core, *e.g.*, House Districts 43 and 89. The July 29 compromise plan again maintains the oddly-configured House District 13, along with the sickle-shaped District 32. It preserves districts with long, narrow bands of precincts jutting outward into other districts, *e.g.*, Districts 33 and 48. District 66, referred to at trial as the "dumbbell" or "barbell" district, contains two mirrored groupings of precincts, connected by a narrow alley, the "bar."

Despite the Supreme Court's pronouncements that a court-ordered redistricting plan should utilize the portions of a legislative plan that do not violate the Constitution or Voting Rights Act, *e.g., Upham v. Seamon,* 456 U.S. 37, 43 (1982), we decline to adopt the Joint Committee Plan. Based on the testimony of the expert witnesses and the United States' July 26 negative response to the plan, we conclude that the Joint Committee failed to show that its plan cured the objections interposed by the United States Attorney General.

Moreover, it is clear to this court that the settlement plan concluded by the Joint Committee and plaintiffs contains changes, different from the plan adopted by the legislature, primarily for the purpose of defeating a member, or members, of the rival House Committee. Likewise, some of the changes involved in converting the plan that failed in the House to the July 11 plan were made for purely political reasons.

Based on testimony from the circuit clerks, the court also perceives a number of logistical problems in adopting the submitted plans because of the number of split precincts they contain. For example, the Joint Committee House plan splits 130 precincts; the plaintiffs' plan splits 77. The July 11 plan splits 139 precincts; and, in order to achieve a settlement between the plaintiffs and the Joint Committee, the July 29 plan splits 166 precincts. As discussed *infra,* the Supreme Court has recognized the logistical problems involved in precinct splitting as a rationale for not adopting a submitted plan for interim use. We note further that using existing law (the 1982 plan) will require splitting fewer precincts than would be required by any of the submitted plans. This court is wary of the

great potential for voter confusion caused by use of any of the submitted plans.

Furthermore, if the court adopts a plan submitted by one or more of the parties, that plan will reflect legislative policy choices. Therefore, preclearance would still be required by the United States Attorney General. *See, e.g.*, ***McDaniel,*** 452 U.S. at 153. The United States Attorney General has advised that review would be expeditious; but review, of whatever length, will require submission of supporting data and result in delay.

Finally, given the original goal of all parties to conduct elections as scheduled, we conclude that any order this court issued after August 2 to establish election procedures would be too late. It would not give candidates enough time to decide whether to run; it would not give those charged with elections enough time to prepare; and it would not give voters adequate opportunity to familiarize themselves with their districts and their candidates.

B.

Accordingly, if elections are to be timely held, they must be held pursuant to existing law – the 1982 plan. Obviously, to not hold the elections on September 17 and November 5 would have an unacceptable adverse impact on the citizens of Mississippi. We find that it is preferable to hold elections on the dates already set for state elections. Conducting special elections after this court has had time to draw its own plan would lead to a lower voter turnout and extra expense for the State, at a time

when the court can take judicial notice of extreme budgetary constraints under which Mississippi, like numerous other States, is operating. Further, the 1982 plan has the advantage of having been adopted by the entire Legislature. It has not been modified by a few legislators, as here, after the Legislature adjourned.

At the hearing, most of the parties agreed that the best course was to hold elections on time, even if it meant using the 1982 plan. The State Defendants emphasized that elections should be held on time, including, if need be, under the 1982 plan. The Republican Party and Democratic Party favored on-time elections under any equitable plan, including the 1982 plan. The House Committee preferred elections under the 1982 plan if the July 11 plan were not used.

Plaintiffs seek, including through their July 29 motion, to enjoin the use of the 1982 plan. They contend that this court may not order its use, on the ground that it is unconstitutionally malapportioned. They also contend that the 1982 plan dilutes black voting strength in violation of § 2 of the Voting Rights Act. We address each of their objections in turn.

1.

The plaintiffs object to use of the 1982 plan on the ground that it violates the principle of one-person, one-vote that the Supreme Court has derived from the Fourteenth Amendment equal protection clause. To be sure, the principle of one-person, one-vote is a bedrock principle of voting rights jurisprudence in this country. As stated in ***Gray v. Sanders***, 372 U.S. 368, 379-80 (1963):

> Once the geographical unit for which a representative is to be chosen is designated, all who participate in the election are to have an equal vote – whatever their race, whatever their sex, whatever their occupation, whatever their income, and wherever their home may be in that geographical unit. This is required by the Equal Protection Clause of the Fourteenth Amendment. The concept of "we the people" under the Constitution visualizes no preferred class of voters but equality among those who meet the basic qualifications. The idea that every voter is equal to every other voter in his State, when he casts his ballot in favor of one of several competing candidates, underlies many of our decisions.

And as stated in ***Reynolds v. Sims***, 377 U.S. 533, 568 (1964):

> We hold that, as a basic constitutional standard, the Equal Protection Clause requires that the seats in both Houses of a bicameral State Legislature must be apportioned on a population basis. Simply stated, an individual's right to vote for State legislators is unconstitutionally impaired when its weight is in a substantial fashion diluted when compared with votes of citizens living in other parts of the State.

But, for obvious reasons, this principle does not – and indeed cannot – require absolute, mathematical exactness. *E.g.*, ***Brown v. Thomson***, 462 U.S. 835, 842 (1983). There can not be total equality, or equal weight, for every vote. Moreover, it is clear that, because of the swiftness with which population can shift and the high

cost of creating new election districts, a state may conduct elections for a reasonable amount of time with districts whose deviations are higher than constitutionally optimal. For example, the House Committee noted that the legislative districts in Mississippi have been malapportioned for a number of years since the 1980 census.

A simple example demonstrates the impossibility of equalizing with mathematical exactness voting strength between various districts. The population for a given geographical unit includes all persons residing within it, whether they are eligible to vote. For example, for equal districts of 20,000 persons, if only 10,000 vote in one district (District A), but 18,000 vote in the other (District B), then a vote in District B has far less weight than a vote in District A. In ***Hadley v. Junior College Dist. of Metro Kansas City, Mo.,*** 397 U.S. 50, 54 (1970), the Supreme Court stated that "[t]his Court has consistently held in a long line of cases, that in situations involving elections, the States are required to ensure that each person's vote counts as much, *insofar as it is practicable,* as any other person's." (Emphasis added.)

Here, with the imminent elections and lack of available options, it is constitutionally permissible to utilize the 1982 plan in fashioning interim relief. The Supreme Court has at times "authorized District Courts to order or to permit elections to be held pursuant to apportionment plans that do not in all respects measure up to the legal requirements, even constitutional requirements." ***Upham,*** 456 U.S. at 44 (1982) (citations omitted). The Court has cited "necessity" as the motivating factor in those instances. ***Id.*** Even in ***Reynolds,*** the case so often cited for

the principle of one-person, one-vote, the Court acknowledged that a court, faced with an illegal apportionment on the eve of an election, may adopt interim plans that would not pass constitutional or statutory muster if adopted on a permanent basis:

> [U]nder certain circumstances, such as where an impending election is imminent and a State's election machinery is already in progress, equitable considerations might justify a court in withholding the granting of immediately effective relief in a legislative apportionment case, even though the existing apportionment scheme was found invalid.

377 U.S. at 585.

It is certainly not a novel principle that a district court, faced with the evils of either disrupting state government or ordering interim relief that falls short of constitutional standards, must sometimes adopt an unconstitutional election system on a temporary basis. In ***Connor v. Williams,*** 404 U.S. 549, 550-51 (1972), for example, the Supreme Court refused to invalidate the results of a Mississippi election even assuming it was held in violation of the one-person, one-vote principle. In ***Kilgarlin v. Hill,*** 386 U.S. 120, 121 (1967), the Supreme Court stated: "We affirm the District Court's action in permitting the 1966 election to proceed under H.B. 195 although constitutionally infirm in certain respects."

The Fifth Circuit, in reviewing a district court's decision to hold elections using an at-large seat instead of constitutionally preferable single-member districts, approved the use of an at-large seat. ***Corder v. Kirksey,*** 639 F.2d 1191, 1196 (5th Cir. 1981), *cert. denied,* 460 U.S.

1013 (1983). It cited as an important factor "the short time [the district court] possessed to fashion a fair remedy in the face of an impending election." ***Id.*** at 1195. The exigent circumstances the district court faced "dictated the use of the at-large plan as a matter of constitutional expediency." ***Id.***

Given the impossibility of crafting a judicial plan in advance of an imminent election, courts have responded in various ways to the need to fashion an emergency remedy. In ***Ely v. Klahr,*** 403 U.S. 108, 113 (1971), for example, the Court affirmed a district court's decision to conduct elections under a constitutionally infirm legislative plan in a situation where the district court "could not itself devise a new plan without delaying primary elections. . . . " The Supreme Court mentioned specifically that the district court declined to adopt the plaintiff-appellant's plan "since it was based on census tracts, rather than the existing precinct boundaries, and 'the necessary reconstruction of the election precincts could not be accomplished in time' to serve the 1970 election, whose preliminary preparations were to begin in a few weeks." ***Id.*** at 111-12 (quoting the district court opinion). The situation facing this court is analogous to that in ***Ely;*** adopting any of the plans proposed by the parties would involve considerable time-consuming alteration in election precincts and voting procedures. And while we would not permit precincts to be configured so as to restrict the opportunities for minority candidates to elect the candidates of their choice, we know of no controlling case law requiring massive splitting of precincts in reapportionment.

In *Terrazas v. Clements,* 537 F. Supp. 514 (N.D. Tex. 1982) (three judge court), the court responded to exigent circumstances created by the Attorney General's refusal to preclear a legislative plan by adopting, as an interim measure, the rejected legislative plan combined with modifications taken from one of the plaintiffs' plans. In deciding which alternative plan to adopt, the court in Terrazas analyzed the law of court-fashioned election plans under exigent circumstances:

> In those [emergency] situations courts are bound to apply equitable considerations and in awarding or withholding immediate relief, a court can and should consider the proximity of a forthcoming election and the mechanics and complexities of the State's election laws. With respect to the timing of relief, a court can reasonably endeavor to avoid a disruption of the election process which might result from requiring precipitate changes that could make unreasonable demands on a State in adjusting to the requirements of the court's decree. Also in an emergency, a district court may adopt as an interim measure a redistricting plan that otherwise may not comply with the stringent requirements for a permanent court ordered plan. Finally, in emergencies, courts have permitted elections to proceed on the basis of enacted plans or existing districts even when the plans in question were themselves unconstitutional.

Id. at 537-38 (citations omitted). We note that the facts of *Terrazas,* in which the court adopted an unprecleared plan as modified, differ from the situation in the case at bar. In *Terrazas,* for example, the court had the opportunity to receive extensive proof on which it could base

its choice of an interim plan. It was in a better position to adopt the legislative plan with modifications because, in its § 5 review, the Justice Department had objected to only a few specific districts rather than generally, as here, to the entire plan.

If the 1982 plan can be used, its use will help alleviate voter confusion, help to ensure adequate time to prepare for the elections, and otherwise enhance those elections. For example, if under a plan other than the 1982 plan, a voter does not know where the polling place is for the elections, it is quite conceivable that the voter will arrive to vote at the wrong polling place at or about the time the polls are closing, only to find that under the new, short-lived plan, he or she is to vote at another place, with the result that time does not permit doing so. Elections are for the voters; it is their opportunity to elect their representatives in the Mississippi Legislature. This court finds that its concerns about the otherwise unacceptable population deviations in certain districts under the 1982 plan are far outweighed by the benefits to the voters in these elections.

Furthermore, a review of the population deviations in districts reflects that while the total population deviations are unacceptable, the deviations in most districts are acceptable, especially for this interim election.[14] In the

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[14] Of the 122 House districts, 79 have a deviation less than 10%. In 16 of the 43 districts with a greater than 10% deviation, the black voting age population is greater than or equal to 50%. The black voting age population is greater than 50% in 27 of the House districts; of those 27, it is greater than 55% in 23 and greater than 60% in 19.

(Continued on following page)

House, for example, roughly two-thirds of the districts have a less than 10% deviation. Sixteen districts of the roughly one-third with greater than 10% deviation are majority black voting age population districts. Slightly under three-fourths of the Senate districts have a less than 10% deviation.

Although the deviation levels using existing districts would certainly be unconstitutional if this court were adopting a permanent reapportionment plan, we hold that elections may be constitutionally held using current districts *on an interim basis*. We stress that all of the options facing this court are undesirable. We conclude, however, that the priority of holding elections on a timely basis warrants a temporary departure from the one-person, one-vote principle, pending adoption of a permanent reapportionment plan by either the Legislature or this court.

This case presents the type of "significant state policies or other acceptable considerations" that the Court alluded to in ***Chapman v. Meier***, 420 U.S. 1, 24 (1975), suggesting that they would justify an election under an otherwise unconstitutional apportionment scheme. ***Chapman*** suggested that a possible justification for diverging

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(Continued from previous page)

Under the 1982 plan, 38 Senate districts have a deviation of less than 10%. Six of the 14 districts with greater than a 9% deviation have a black voting population greater than or equal to 50%; for those with over a 10% deviation, the black voting age population is greater than or equal to 50% in three. Of the 52 Senate districts, the black voting age population is more than 50% in nine. Of those nine, it is greater than 55% in eight, and greater than 60% in four.

from the one-person, one-vote requirement is "the maintenance of compactness and contiguity in legislative districts." *Id.* at 23. We emphasize that the situation we are faced with involves several "unique features," *id.* at 26, including an exceptionally expedited schedule and a shortage, if not lack, of acceptable options. Moreover, conducting elections using existing malapportioned districts will further a number of legitimate state policies. It will allow on-time elections; avoid non-compact districts that divide up communities of interest for a political result; and permit the Legislature or this court to resolve the problem of districting in Mississippi with a full opportunity for hearings and input from the public.

2.

The plaintiffs charge that the 1982 plan dilutes black voting strength in violation of § 2. They urge that they satisfy the well established four-part test for injunctive relief.[15] However, we need not reach the issue of the 1982 plan's invalidity under § 2, because we are utilizing the 1982 plan only for interim relief, pending adoption of a plan that meets the requirements of the Constitution and the Voting Rights Act. We hold that, because this court is

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[15] There are "four requirements for preliminary injunctive relief: (1) a substantial likelihood that the movants will ultimately prevail on the merits; (2) that they will suffer irreparable injury if the injunction is not issued; (3) that the threatened injury to the movants outweighs the potential harm to the opposing party; and (4) that the injunction, if issued, would not be adverse to the public interest." ***Haitian Refugee Center, Inc. v. Nelson,*** 872 F.2d 1555, 1561-62 (11th Cir. 1989), *aff'd,* ___ U.S. ___, 111 S. Ct. 888 (1991).

not adopting, or utilizing, the 1982 plan as a permanent plan, but for an interim period, plaintiffs do not satisfy the test for preliminary relief.[16]

The plaintiffs contend that this court is under a duty, even in fashioning interim relief, to create the maximum number of minority districts possible. While maximizing the number of majority black districts that can be drawn with a reasonable degree of compactness and contiguousness may well be a legitimate political, or other, objective, it is not an objective that this court can resolve in the limited time remaining. A trial necessary for resolving the detailed and varying claims for such districts would preclude the elections being timely held.

We express no opinion on the question of whether § 2 of the Voting Rights Act requires that a court, in ordering a reapportionment plan, create as many districts with a non-white majority as possibly can be created. We note, however, that it is not at all clear that the Voting Rights Act requires a district court, in shaping a *permanent* reapportionment plan, to order the creation of districts that lack significant compactness in order to create as many non-white majority voting districts as possible. It is even less clear that, for a *temporary* plan, the Constitution or Voting Rights Act requires that a court maximize the

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[16] In *Chisom*, the Fifth Circuit held that, even where a violation of § 2 of the Voting Rights Act was established, that statutory infringement does not automatically do irreparable injury. 853 F.2d at 1188-89. Where, as here, the possibility of corrective relief at a later date exists, even an established voting rights act violation does not in and of itself merit a preliminary injunction. *Id.*

number of non-white majority districts at the expense of creating districts with distorted boundaries.

In ***Thornburg v. Gingles***, 478 U.S. 30 (1986), for example, the Court stresses geographical compactness as a prerequisite to minority voters' establishing a claim of vote dilution. In speaking of a claim of vote dilution based on the use of multi-member districts, the Court states that "the minority group must be able to demonstrate that it is sufficiently large and *geographically compact* to constitute a majority in a single-member district." ***Id.*** at 50 (emphasis added and footnote omitted). The Court also states in *dicta* that in a gerrymander case, like the one at bar, in which minority voters allege that the minority group has been split among two or more single-member districts, plaintiffs must allege that "the minority group . . . is sufficiently large and compact to constitute a single-member district. . . . " ***Id.*** at 50 n.16. ***Gingles*** does not interpret § 2 of the Voting Rights Act to require the creation of majority non-white districts that are not geographically compact. We reiterate that numerous majority black districts contained in each of the plans submitted to this court are created at the expense of distorting district boundaries.

Cases decided prior to the 1982 amendment of the Voting Rights Act uniformly hold that states are not required to seek out ways to maximize the number of black majority districts. *See, e.g.*, ***Mississippi v. United States,*** 490 F. Supp. 569, 582 (D.D.C. 1979) (three judge court) ***aff'd mem.***, 444 U.S. 1050 (1980) ("No state or political subdivision is required to search for ways to maximize the number of black voting age population districts. Likewise, no racial group has a constitutional or statutory

right to an apportionment structure designed to maximize its political strength." (citations omitted)). Similarly, in a 1981 case, the Fifth Circuit held that a "safe" minority seat in a redistricting scheme is not a federal prerequisite under either the Constitution or the Voting Rights Act. *See* ***Wyche v. Madison Parish Police Jury***, 635 F.2d 1151, 1161 (5th Cir. 1981).

It is doubtful whether ***Gingles*** held, as plaintiffs suggest, that the amended Voting Rights Act § 2 requires that states go beyond the requirement of non-discrimination in order to create as many non-white majority districts as possible. *See, e.g.*, ***Jeffers v. Clinton***, 730 F. Supp. 196, 217 (E.D. Ark. 1989) (three judge court), *aff'd mem.*, 111 S. Ct. 662 (1991) ("We are not holding that the law requires the creation of any particular number of majority-black districts.").

Plaintiffs contend that their negotiation for 40 black districts during the legislative session reflects the degree of black representation that is appropriate under the Constitution and Voting Rights Act. While the creation of 40 black majority districts may be an acceptable legislative goal, even if it means creating a significant number of noncompact districts, it is not a goal that this court must, or necessarily should, implement as interim relief. We note that, because 35% of Mississippi's citizens are black, 40 seats out of a 122-member House (33%) approximates proportional representation for black citizens in Mississippi. The Voting Rights Act does not mandate proportional representation in a permanent reapportionment plan and certainly not for an interim plan. In fact, it is just the opposite; § 2 provides that "nothing in this section establishes a right to have members of a protected

class elected in numbers equal to their proportion in the population." 42 U.S.C. § 1973(b).[17]

Moreover, cases that order a remedy to a Voting Rights Act violation after a full hearing and an opportunity for plenary proof by the parties do not involve the same circumstances as we face. This case should be considered in the line of cases establishing an interim reapportionment plan for use in an imminent upcoming election. Consequently, the issue of what configuration of

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[17] The Fifth Circuit in *Jones v. City of Lubbock*, 727 F.2d 364, 386 (5th Cir. 1984) admonishes courts to avoid proportional representation, on the one hand, and blindness to racial effect on the other:

> A district judge adopting districting plans to replace an invalidated at-large system must adhere to a middle road. While a court must avoid drafting a plan as a device for installing proportional representation, so also, the court cannot blind itself to the effect of its districting plan on racial groups. [citing *Wyche*]. We believe that, at least insofar as the City complains of racial fairness, the court remained well within its discretion.

(Citation omitted.) In *Jordan v. Winter*, 604 F.Supp. 807, 814 (N.D. Miss. 1984), *aff'd mem., Miss. Republican Executive Comm. v. Brooks*, 469 U.S. 1002 (1984), the court stated that "[a]lthough the use of a race-conscious remedy for discrimination, approved by the Supreme Court in *United Jewish Organizations v. Carey*, 430 U.S. 144 (1977), can come into tension with Congress' disclaimer in amended § 2 of any right to proportional representation, the plan we have adopted fully rectifies the dilution of black voting strength in the Second District and satisfies the requirements of amended § 2 without achieving proportional representation for blacks in Mississippi."

black majority districts best satisfies § 2 of the Voting Rights Act for a permanent plan is not in issue.

We note that, in an interim election held under the 1982 plan, black voters have a good opportunity to increase the number of black legislators in both chambers of the Mississippi Legislature (presently 20 black members in the House, two in the Senate). For example, there is a black voting age population majority in 27 of the 122 House districts. In 19 of those 27 districts, there is a supermajority black voting age population of greater than 60%. In the Senate, there are 9 majority black voting age population districts, and 8 of those 9 contain a 55% or greater majority black voting age population. Moreover, using the 1982 plan districts and comparing the population distribution among those districts under the 1980 and 1990 census figures, it appears that there is no retrogression of minority voting strength.[18]

3.

Accordingly, although the legislative districts under the 1982 plan are doubtless unconstitutionally malapportioned for a full four-year term of office, this court, exercising its equitable powers, holds that under the facts in

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[18] An analysis of Senate districts with a 45% or greater black voting age population under the 1980 census with 1982 districts, as compared to the black voting age population of the same districts using 1990 census data, reveals that virtually all districts maintained or increased the level of black voting age population, despite population shifts within and among districts. The parties did not introduce figures for population distribution in the House using 1980 census data.

this case, including the imminent elections, they may be constitutionally utilized for interim relief. Those persons elected pursuant to 1991 legislative elections shall hold office until their successors are elected under an apportionment plan which complies with the Voting Rights Act and the United States and Mississippi Constitutions. That plan will be effected either by (a) a legislative plan, precleared by the United States Attorney General or approved by a three-judge court in the District of Columbia, 42 U.S.C. § 1973c, or (b) a plan ordered by this court.

We emphasize that, in declining to order a court-fashioned plan for use in the upcoming elections, this court is not abdicating its responsibility to enforce the provisions of the Voting Rights Act and the constitutional requirement of one-person, one-vote. Far from it. We have retained jurisdiction of this action. We would not consider – nor would the parties suggest – use of the 1982 plan if we were implementing a permanent plan. However, this court has been presented with a range of untenable options; and we conclude that conducting elections under the existing plan is the lesser of the available evils.

The Mississippi Legislature elected in the fall of 1991 convenes in January 1992. As ordered on August 2, 1991, we will hold a status conference on March 2, 1992, following submission of special master nominees.

III.

For the foregoing reasons, we entered our orders on August 2 and 8, 1991, fashioning interim relief for the

1991 elections for the Mississippi Legislature and declining to enjoin those elections pending appeal of that August 2 order.

SO ORDERED.

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI
JACKSON DIVISION

HOLLIS WATKINS, ET AL.,
Individually And On Behalf Of
All Others Similarly Situated — PLAINTIFFS

VS. — CIVIL ACTION NO. J91-0364(L)

RAY MABUS, Governor Of
Mississippi, ET AL. — DEFENDANTS

THE STANDING JOINT LEGISLATIVE
COMMITTEE ON REAPPORTIONMENT OF
THE MISSISSIPPI LEGISLATURE;
TIM FORD, In His Official Capacity
As Speaker Of the Mississippi
House of Representatives; And
GLEN S. DEWEESE, In His Official Capacity
As President Pro Tempore Of The
Mississippi Senate; and THE
STANDING COMMITTEE OF APPORTIONMENT
AND ELECTIONS OF THE MISSISSIPPI
HOUSE OF REPRESENTATIVES
DEFENDANTS-INTERVENORS

ORDER
(Filed Aug. 30, 1991)

The Mississippi Democratic Party Executive Committee on August 21, 1991, filed a motion (concurred in by the Mississippi Republican Party Executive Committee and the State Election Commission) for clarification of this court's August 2, 1991 order, whereby the Democratic Committee proposed an alteration of the court's order for the purpose of assuring that the primary elections scheduled for September 17, 1991 be conducted properly and

with a minimum of confusion. Specifically, the Committee proposed certain amendments which it contended would avoid an interpretation of the court's order which might lead to certain absentee voters being allowed to vote only for legislative races and not for the candidates of their choice in other elections scheduled for September 17. On August 23, plaintiffs filed objections to the Committee's motion, asserting that the court lacks jurisdiction to grant the requested relief. Thereafter, on August 26, plaintiffs amended their response and objections and additionally filed a motion for preliminary injunction under § 5 of the Voting Rights Act, asserting that the court's August 2 order respecting legislative elections, and any amendments to that order which encompass changes in voting, must be enjoined inasmuch as voting changes established by the court's order were created and drafted by the Democratic and Republican Parties and the State of Mississippi but were not precleared as required by § 5.

The court finds that plaintiffs' objections to the motion for clarification, as well as their motion for preliminary injunction, are not well taken. As an initial matter, the court finds that it has jurisdiction to grant the relief (clarification) requested by the Democratic Committee. Furthermore, the court would make the following observations concerning the plaintiffs' present position concerning the applicability of § 5 to the court's August 2 order and any alteration thereof. While plaintiffs did object to the court's decision to order the conducting of legislative elections under the 1982 plan, as evidenced by their efforts to have that ruling stayed by the United States Supreme Court, plaintiffs at no time prior to the filing by the Democratic Party for clarification, raised nor

even intimated any objection to the specific terms of the court's order setting forth the methods by which the primary elections would be conducted. Only in response to the proposed clarification of the court's order, and not even in their *initial* response, did plaintiffs protest any provision of that order pertaining to changes in election procedures. Plaintiffs' filing of the present objections and motion for injunctive relief is most surprising, however, not for plaintiffs' dilatoriness in asserting their present position – though that fact alone might dictate denial of their motion – but rather for the fact that plaintiffs' counsel, Wilbur Colom, was a primary source of the "changes" which plaintiffs now challenge.

The court's August 2 order provides *interim relief*. The court's determination regarding the necessity of changes in certain election procedures for the purpose of assuring that elections would be conducted in a timely and orderly fashion was based in large part on the testimony of Wayne Parker, the president of the State Circuit Clerk's Association, and the testimony of Ruth Shirley, Hinds County Election Commissioner, and Deborah Dunn, Circuit Clerk of Calhoun County. That the parties – including plaintiffs – were permitted to make suggestions to the court regarding provisions of the court's order does not suggest the conclusion that the order reflects "policy choices of . . . elected representatives." Plaintiffs' Motion for preliminary injunction is, therefore, DENIED. Further, the motion for clarification is GRANTED.

It is, therefore, ordered and adjudged that the August 2, 1991 order should be changed as follows:

Paragraph 5 shall be changed, in part, to read:

> 5. Solely for the September 17, primary election and because of the extended qualifying deadline, the following changes to certain election procedures shall be in effect:

Paragraph 5(e) shall be changed to read:

> e. If necessary, voting in the first primary for legislative races may be by paper ballots, with the paper ballots to be used in combination with the voting devices utilized for the conduct of all other elections on September 17. This order does not authorize the use of paper ballots for other elections scheduled for September 17, 1991.

No other changes are made in the order.

ORDERED, this 30th of August, 1991.

/s/ Rhesa H. Barksdale
RHESA H. BARKSDALE
UNITED STATES
CIRCUIT JUDGE

/s/ Tom S. Lee
TOM S. LEE
UNITED STATES
DISTRICT JUDGE

/s/ Charles W. Pickering, Sr.
CHARLES W. PICKERING, SR.
UNITED STATES
DISTRICT JUDGE

ORDER LIST

TUESDAY, AUGUST 20, 1991

ORDER IN PENDING CASE

A-116 HOLLIS WATKINS, ET AL. V. RAY MAYBUS, GOVERNOR OF MISSISSIPPI, ET AL.

The application for injunction and stay pending appeal presented to Justice Scalia and by him referred to the Court is denied.

Justice Marshall and Justice Blackmun would grant the application for injunction and stay.

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI
JACKSON DIVISION

HOLLIS WATKINS, ET AL.,
Individually And On Behalf Of All
Others Similarly Situated — PLAINTIFFS

VS. — CIVIL ACTION NO. J91-0364(L)

RAY MABUS, Governor Of
Mississippi, ET AL. — DEFENDANTS

THE STANDING JOINT LEGISLATIVE
COMMITTEE ON REAPPORTIONMENT
OF THE MISSISSIPPI LEGISLATURE;
TIM FORD, In His Official Capacity
As Speaker Of The Mississippi
House of Representatives; And
GLEN S. DEWEESE, In His Official
Capacity As President Pro Tempore
Of The Mississippi Senate,
ET AL. — DEFENDANTS-INTERVENORS

ORDER

(Filed Aug. 08, 1991)

Plaintiffs' Amended Motion for Stay of Order Scheduling 1991 Elections for Mississippi Legislature and their Motion for Injunction Pending Appeal are denied for the reasons to be stated in this court's opinion that will be issued forthwith, which will also pertain to this court's August 2, 1991 order.

ORDERED this 8th day of August, 1991.

/s/ Rhesa H. Barksdale
RHESA H. BARKSDALE
UNITED STATES
CIRCUIT JUDGE

/s/ Tom S. Lee
TOM S. LEE
UNITED STATES
DISTRICT JUDGE

/s/ Charles W. Pickering, Sr.
CHARLES W. PICKERING, SR.
UNITED STATES
DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI
JACKSON DIVISION

HOLLIS WATKINS, ET AL. PLAINTIFFS

V. CIVIL ACTION NO. J91-0364(L)

RAY MABUS, GOVERNOR OF THE STATE OF MISSISSIPPI, ET AL. DEFENDANTS

MOTION FOR CLARIFICATION OF ORDER

Comes now the defendant, Mississippi Democratic Party Executive Committee, and moves this Court, pursuant to paragraph 6 of its August 2, 1991 Order, for a clarification of said Order, or in the alternative, for a change in election procedures, and in support thereof would show this Court the following:

1. That paragraph 5 of this Court's Order of August 2, 1991 should be altered consistent with language in Exhibit "A" to this Motion which is incorporated herein for all purposes.

2. That the proposed changes are minor but are necessary to assure that the elections scheduled for September 17, 1991 are conducted properly and with a minimum of confusion. Specifically, the changes will avoid an interpretation of the Court's Order which might lead to certain absentee voters being allowed to vote only for the legislative races and not for the candidates of their choice in the other elections which are scheduled for September 17.

3. That the State defendants and the Mississippi Republican Party Executive Committee have been consulted regarding these changes and support the changes for the reasons stated above.

WHEREFORE, the Mississippi Democratic Party Executive Committee requests that the Court adopt the proposed changes or grant whatever relief it believes appropriate under the circumstances.

Respectfully submitted,

MISSISSIPPI DEMOCRATIC PARTY
EXECUTIVE COMMITTEE

BY: /s/ JW
Its Attorney

EXHIBIT "A"

5. Solely for the September 17 primary election and because of the extended qualifying deadline, the following changes to certain election procedures shall be in effect:

a. The Democratic and Republican Party State Executive Committees shall mail or otherwise make available official sample ballots to their respective county executive committees in accordance with their customary practices, no later than Thursday, August 15, 1991. Those sample ballots will be utilized by the county executive committees without revision.

b. Qualified absentee voters shall be allowed to vote at their respective circuit clerk's office until 12:00 noon on Monday, September 16, 1991.

c. Absentee ballots mailed to the circuit clerk shall be accepted and counted if they are received by mail in the office of the circuit clerk on or before 5:00 p.m. on September 17, 1991.

d. In order to allow absentee ballots to be mailed at the earliest possible date, the circuit clerks may print absentee ballots in a form or size which is different from the regular official ballot, provided that the absentee ballots are in the same order of arrangements as the regular official ballot.

e. If necessary, voting in the first primary for legislative races may be by paper ballots, with the paper ballots to be used in combination with the voting devices utilized for the conduct of all other elections on September 17. This order does not authorize the use of paper ballots for other elections scheduled for September 17, 1991.

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI
JACKSON DIVISION

HOLLIS WATKINS, ET AL. PLAINTIFFS

VS. CIVIL ACTION NO. J91-0364(L)

RAY MABUS, GOVERNOR OF THE STATE OF MISSISSIPPI, ET AL. DEFENDANTS

PLAINTIFFS' AMENDED RESPONSE AND OBJECTIONS TO DEFENDANT-INTERVENOR'S MOTION FOR CLARIFICATION OF ORDER

(Filed Aug. 26, 1991)

Come now plaintiffs, by and through their undersigned counsel, and file this their amended response and objections to the defendant-intervenor's, Mississippi Democratic Party Executive Committee's, motion for clarification of Order as follows:

1. Paragraph 6 of this Court's August 2, 1991 Order is not authority for the relief requested by the defendant-intervenor in its motion for clarification of order. Paragraph 6 of the August 2, 1991 Order specifically states: (1) that it applies to any requested changes "in election procedures . . . for the Mississippi Legislature", and (2) that the relief shall be "requested forthwith". The changes requested by the Mississippi Democratic Party Executive Committee do not pertain to election procedures for the Mississippi Legislature. Those requested changes pertain to election procedures for other offices over which this Court does not have jurisdiction. Additionally, the Order was filed August 2, 1991, and the requested relief was not made until on or about August 20, 1991, 18 days after entry of the August 2, 1991 Order and 27 days before the

scheduled primary elections. The relief was not requested forthwith as ordered by this Court.

2. Paragraph 5 of this Court's August 2, 1991 Order should not be altered consistent with the language requested by the Mississippi Democratic Party Executive Committee in Exhibit "A" attached to their motion on the grounds that this Court lacks subject matter and in personam jurisdiction and the requested relief could affect the orders of other courts, federal and state, which might have changed certain election procedures for Boards of Supervisors, Constables, and Justice Court Judges. Plaintiffs invoked federal jurisdiction in this case with respect to legislative reapportionment and election practices and procedures for legislative elections only. Plaintiffs did not invoke any federal jurisdiction with respect to any county (board of supervisor, constable, or justice court) redistricting or election procedures or practices for any other state or county elective office. Plaintiffs did not make any county election officials charged with the responsibility of conducting partisan primary elections for county elective offices a party to this lawsuit. Plaintiffs request that this Court take judicial notice of the fact that several voting rights lawsuits affecting elections for the offices of boards of supervisor, constables, and justice court judges for several counties have been filed in federal court and some of those courts have issued orders effectuating changes to certain election procedures for those boards of supervisor, constable, and justice court offices. This Court would not have the jurisdiction or the authority to alter the orders of those other federal courts. Indeed, the parties in those county voting rights lawsuits are not parties to the instant action. None of the parties to those county

voting rights actions have even received notice of the motion for clarification of order filed by the Mississippi Democratic Party Executive Committee.

3. The proposed changes are not minor. The proposed changes are major and would constitute a serious intrusion by this Court into the jurisdiction of other federal and/or state courts and a serious alteration of election laws for political offices not the subject of the instant action. Such an intrusion is not necessary to assure that the September 17, 1991 primary elections are conducted properly and with a minimum of confusion. The Court's Order of August 2, 1991 does not prevent any voter from voting, by absentee ballot, for any office offered for election. Absentee voters could still vote within the deadline provided by existing state law or by order of any other federal or state court for all offices other than legislative offices. Absentee voters could vote within the deadline provided by this Court's August 2, 1991 Order for legislative offices.

4. The United States Supreme Court has held that "§ 5 applies to any change 'reflecting the policy choices of the elected representatives of the people,' even if a judicial decree constrains those choices." *Hathorn v. Lovorn*, ___ U.S. ___, 102 S. Ct. 2421, 2428 n. 16 (1982) citing *McDaniel v. Sanchez*, 452 U.S. 130, 153, 101 S. Ct. 2224, 2238, 68 L. Ed. 2d 724 (1981). The Supreme Court went on to state in *Hathorn* that "[W]hen state or local officials comply with a court order to enforce a state statute, there is no doubt that their actions 'reflec[t] the policy choices of . . . elected representatives." Since it was the political parties that drafted the proposed language in the August 2, 1991 Order respecting the conducting of party primary

elections, the August 2, 1991 Order has to be precleared. Any further alterations of that order, as suggested by the Democratic Party Executive Committee, likewise would require preclearance. At this late date, it is doubtful that preclearance of the additional suggested changes could be obtained in time to hold the primary elections as scheduled.

5. Plaintiffs object to the proposed changes and assert that this Court is without jurisdiction or power to effectuate the changes requested and that any changes to the state's election laws, as suggested by the political parties, must be precleared.

WHEREFORE, plaintiffs request that this Court deny defendant-intervenor's, the Mississippi Democratic Party Executive Committee's, motion for clarification of order and the relief requested therein.

Respectfully submitted,
HOLLIS WATKINS, ET AL., on behalf of themselves and all others similarly situated, PLAINTIFFS

BY: /s/ Carroll Rhodes

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IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI
JACKSON DIVISION

HOLLIS WATKINS, ET AL. PLAINTIFFS

VS. CIVIL ACTION NO. J91-0364(L)

RAY MABUS, GOVERNOR OF THE STATE OF MISSISSIPPI, ET AL. DEFENDANTS

MOTION FOR PRELIMINARY INJUNCTION UNDER § 5

(Filed Aug. 26, 1991)

Plaintiffs, pursuant to 42 U.S.C. § 1973c, hereby move this Honorable Court to enjoin the enforcement of its August 2, 1991 Order respecting legislative elections, and any amendments to that order which encompass changes in voting, on the grounds that the August 2, 1991 Order contains changes in voting that were created and drafted by the Democratic Party and Republican Party of the State of Mississippi and those changes have not yet been precleared pursuant to § 5 of the Voting Rights Act of 1965.

This the 26th day of August, 1991.

Respectfully submitted,
HOLLIS WATKINS, ET AL., on behalf of themselves and all others similarly situated,
PLAINTIFFS

BY: /s/ Carroll Rhodes

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI
JACKSON DIVISION

HOLLIS WATKINS, ET AL. **PLAINTIFFS**

VS. **CIVIL ACTION NO. J91-0364(L)**

RAY MABUS, GOVERNOR OF THE STATE OF MISSISSIPPI, ET AL. **DEFENDANTS**

NOTICE OF MOTION

TO: Steve Kirchmayr, Esq.
Jim Warren, Esq.
Mike Wallace, Esq.
Hubbard Saunders, IV, Esq.
John Reeves, Esq.

PLEASE TAKE NOTICE that plaintiffs will call up their motion for preliminary injunction under § 5 before Honorable Rhesa Barksdale, Circuit Judge, Honorable Tom S. Lee, District Judge, and Honorable Charles Pickering, District Judge, at the James O. Eastland Courthouse, 215 East Capitol Street, Jackson, Mississippi as soon as counsel can be heard.

This the 26th day of August, 1991.

/s/ Carroll Rhodes

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IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI
JACKSON DIVISION

HOLLIS WATKINS, ET AL.,
Individually And On Behalf Of
All Others Similarly Situated PLAINTIFFS

vs. CIVIL ACTION NO. J91-0364(L)

RAY MABUS, Governor Of
Mississippi, ET AL.

THE STANDING JOINT LEGISLATIVE
COMMITTEE ON REAPPORTIONMENT OF
THE MISSISSIPPI LEGISLATURE;
TIM FORD, In His Official Capacity
As Speaker Of The Mississippi
House of Representatives; And
GLEN S. DEWEESE, In His Official Capacity
As President Pro Tempore Of The
Mississippi Senate DEFENDANTS-INTERVENORS

JOINT RESPONSE OF STATE DEFENDANTS, THE MISSISSIPPI DEMOCRATIC PARTY EXECUTIVE COMMITTEE, AND THE MISSISSIPPI REPUBLICAN PARTY EXECUTIVE COMMITTEE, IN OPPOSITION TO PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION UNDER SECTION 5 OF THE VOTING RIGHTS ACT

COME NOW Ray Mabus, Governor of the State of Mississippi, Dick Molpus, Secretary of State of the State of Mississippi, and Mike Moore, Attorney General of the State of Mississippi, as members of the State Board of Election Commissioners' the Mississippi Democratic Party Executive Committee; and the Mississippi Republican Party Executive Committee and file this their

response in opposition to plaintiffs' Motion for Preliminary Injunction under § 5 of the Voting Rights Act and state:

1. This Court has jurisdiction to issue and to modify paragraph 5 of its order dated August 2, 1991.

2. The temporary adjustment to state election laws set out in this Court's order of August 2, 1991 is an interim remedial remedy adopted under exigent circumstances and does not require preclearance under Section 5 of the Voting Rights Act prior to implementation.

3. The state election law changes contained in this Court's order dated August 2, 1991 to not reflect policy choices of elected representatives but reflect the district court's solution to the election problems brought about by the filing of this action.

4. The state election law changes contained in paragraph 5(b) and 5(c) of this Court's August 2, 1991 order were raised by the plaintiffs. The proposed language for this Court's order was made by the plaintiffs through their counsel as more fully described in the Affidavit of Jim Warren which is attached hereto as Exhibit "1" and the Affidavit of Reese Partridge which is attached hereto as Exhibit "2".

5. The testimony of Wayne Parker, Circuit, Clerk of Lamar County; Ms. Ruth Shirley, Hinds County Election Commissioners; and, Ms. Deborah Dunn, Circuit Clerk of Calhoun County is incorporated herein by reference.

6. The plaintiffs have failed to prove that the Court's August 2, 1991 order modifying state election

procedures has any potential for discrimination. Accordingly, such changes do not require preclearance under Section 5 of the Voting Rights Act.

7. In the alternative, if this Court concludes that any or all of the state election law changes contained in the August 2, 1991 order require § 5 approval, respondents contend that this court should remove such change(s) from its August 2, 1991 order and permit the 1991 legislative election to proceed under existing state election law.

WHEREFORE PREMISES CONSIDERED, respondents pray that this Court deny plaintiffs Motion for Preliminary Injunction under § 5; alternatively, that if this Court finds that any are or all of the state election changes contained in the August 2, 1991 order require § 5 approval, then this Court should remove such change(s) from the August 2, 1991 order and permit the 1991 legislative elections to proceed under existing state election law; and, respondents request any and all further relief to which they may be entitled.

Respectfully submitted,

RAY MABUS, Governor of
the State of Mississippi,
MIKE MOORE, Attorney General
of the State of Mississippi,
and DICK MOLPUS, Secretary
of the State of the State
of Mississippi, in their
respective official capacities
and as members of the State
Board of Election Commissioners

/s/ Mike Moore
MIKE MOORE; ATTORNEY

GENERAL OF THE
STATE OF MISSISSIPPI

/s/ Stephen J Kirchmayr
STEPHEN J. KIRCHMAYR
DEPUTY ATTORNEY GENERAL

/s/ Giles W Bryant
GILES W. BRYANT
SPECIAL ASSISTANT
ATTORNEY GENERAL

Office of the Attorney General
Post Office Box 220
Jackson, Ms 39205
Telephone: (601) 359-3680

/s/ Jim Warren by SK
JIM WARREN, ESQUIRE

Counsel for Mississippi
Democratic Party
Executive Committee

Waycaster & Warren
405 South State Street
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Telephone: (601) 355-3910

/s/ Michael B Wallace by SK
MICHAEL B. WALLACE,
ESQUIRE

Counsel for Mississippi
Republican Party
Executive Committee

Phelps Dunbar
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Mirror Lake Plaza
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Telephone: (601) 939-3895

EXHIBIT "1"

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI
JACKSON DIVISION

HOLLIS WATKINS, ET AL. **PLAINTIFFS**

V. **CIVIL ACTION NO. J91-0364(L)**

RAY MABUS, GOVERNOR OF THE STATE OF MISSISSIPPI, ET AL. **DEFENDANTS**

AFFIDAVIT

STATE OF MISSISSIPPI

COUNTY OF HINDS

PERSONALLY APPEARED before me, the undersigned authority in and for the jurisdiction aforesaid, JIM WARREN, who, after being duly sworn, stated the following on personal knowledge and belief:

I am attorney of record for the Mississippi Democratic Party Executive Committee in this lawsuit.

A status conference was held in this action on Monday, July 22, 1991. During that status conference, Wilbur Colom, one of the attorneys for the plaintiffs, suggested to the Court that special procedures would be necessary in order to hold elections on September 17, 1991. He further suggested that the Democratic and Republican Party Executive Committees should make a proposal to the Court in that regard.

After the July 22, 1991 status conference was concluded, Mr. Colom approached me and indicated that

substantial departures from state law were necessary in order to assure maximum voter participation in the September 17 primary. Specifically, Mr. Colom suggested that it would be necessary to greatly expand the use of affidavit ballots for voters who appeared to vote on election day but were not listed on poll books. Mr. Colom also suggested that the deadlines regarding absentee balloting should be extended, in light of the shortened time clerks would have to mail out such ballots to absentee voters.

A hearing was held in this lawsuit during the week of July 29, 1991. During that hearing, the Court requested that the political parties, in consultation with counsel for the other litigants, should submit a proposal for changes in election procedure for consideration by the Court. As counsel for the Democratic Party, i undertook to coordinate this effort. In order to accomplish this task, I engaged in consultation with the Republican Party, the Mississippi Attorney General, the Secretary of State, and the Governor's Office. I also asked Mr. Colom, counsel for the plaintiffs, if he would like to make any suggestions on behalf of his clients. He stated that he had very specific suggestions and that he would put those suggestions on paper and provide them to me.

Mr. Colom did, in fact provide a handwritten list of proposed election changes to me for inclusion in our submission to the Court. I, in turn, gave Mr. Colom's suggestions to Reese Partridge, a staff attorney with the Secretary of State's Office. Mr. Partridge made comments on those suggestions and shared those comments with me.

On August 1, 1991, I submitted the proposal. A copy of that submission is attached hereto as Exhibit "A". While the proposal was a submission of the Mississippi Democratic Party Executive Committee only, it was made after consultation with the Republican Party, the State defendants, and Mr. Colom as is set out above. In fact, Mr. Colom's suggestions were the basis for the proposed language concerning the extension of deadlines for absentee ballots.

And further, Affiant sayeth not.

/s/ J Warren
Jim Warren

SWORN TO AND SUBSCRIBED BEFORE ME, this, the 29th day of August, 1991.

/s/ Debra Rooney
Notary Public

My commission expires:

My Commission Expires June 14, 1994

EXHIBIT "A"

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI
JACKSON DIVISION

HOLLIS WATKINS, ET AL. **PLAINTIFFS**

V. **CIVIL ACTION NO. J91-0364(L)**

RAY MABUS, GOVERNOR OF THE STATE OF MISSISSIPPI, ET AL. **DEFENDANTS**

PROPOSED LANGUAGE FOR COURT'S ORDER

(Filed Aug. 1, 1991)

Defendant, the Mississippi Democratic Party Executive Committee, after consultation with the Mississippi Republican Party Executive Committee and the State Defendants, hereby submits, as requested by this Court, proposed language to be included in the Court's order adopting a plan for legislative elections.

1. The qualifying deadline for 1991 legislative elections is hereby set for Monday, August 12, 1991 at 5:00 p.m.

2. The Republican and Democratic Party State Executive Committees shall mail or otherwise make available official sample ballots to their respective county executive committees in accordance with their customary practices no later than Thursday, August 15, 1991. Such sample ballots will be utilized by the county executive committees without revision.

3. Qualified absentee voters shall be allowed to vote at their respective circuit clerk's office until 12:00 noon on Monday, September 16, 1991.

Absentee ballots mailed to the circuit clerk shall be accepted and counted if they are received by mail in the office of the circuit clerk on or before 5:00 p.m. on September 17, 1991.

4. In order to allow absentee ballots to be mailed out at the earliest possible date, the circuit clerks are authorized to print absentee ballots in a form or size which is different from the regular official ballot, provided that the absentee ballots are in the same order of arrangement as the regular official ballot.

5. Voting in the September 17, 1991 legislative primary elections contemplated by this order may be by paper ballots, said paper ballots to be used in combination with the voting devices utilized for the conduct of all other elections. This order does not authorize the use of paper ballots for other elections scheduled for September 17, 1991.

Respectfully submitted,

MISSISSIPPI DEMOCRATIC
PARTY EXECUTIVE COMMITTEE

BY: /s/ J Warren
Its Attorney

Jim Warren, MSB #35243
Waycaster & Warren
403 South State Street
Post Office Box 23366
Jackson, Mississippi 39225
(601) 355-3910

Charles E. Griffin
419 S. State Street
Jackson, Mississippi 39201
(601) 364-0603

Attorneys for Mississippi
Democratic Party Executive
Committee

CERTIFICATE

The undersigned attorney hereby certifies that he has this day hand delivered a true and correct copy of the above and foregoing document to:

Honorable Michael B. Wallace
Phelps Dunbar
Post Office Box 55507
Jackson, Mississippi 39296-5507

Honorable Bill Allain
Post Office Box 2398
Jackson, Mississippi 39225-2398

Honorable Giles W. Bryant
Office of the Attorney General
Post Office Box 220
Jackson, Mississippi 39205-0220

Honorable John K. Tanner
U. S. Department of Justice
c/o U. S. Attorney
188 E. Capitol St., Suite 500
Jackson, Mississippi 39201

Honorable J. Dewayne Thomas
Post Office Box 65
Jackson, Mississippi 39205

Honorable John Walker
Walker, Walker & Green
222 Landmark Center
Jackson, Mississippi 39201

SO CERTIFIED, this, the 1st day of August, 1991.

/s/ J Warren
Jim Warren

EXHIBIT "2"

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI
JACKSON DIVISION

HOLLIS WATKINS, ET AL.,
Individually And On Behalf Of
All Others Similarly Situated PLAINTIFFS

vs. CIVIL ACTION NO. J91-0364(L)

RAY MABUS, Governor Of
Mississippi, ET AL.

THE STANDING JOINT LEGISLATIVE
COMMITTEE ON REAPPORTIONMENT OF
THE MISSISSIPPI LEGISLATURE;
TIM FORD, In His Official Capacity
As Speaker Of The Mississippi
House Of Representatives; And
GLEN S. DEWEESE, In His Official Capacity
As President Pro Tempore Of The
Mississippi Senate DEFENDANTS-INTERVENORS

AFFIDAVIT OF REESE PARTRIDGE

STATE OF MISSISSIPPI
COUNTY OF HINDS

PERSONALLY APPEARED BEFORE ME, the undersigned authority in and for the jurisdiction aforesaid, REESE PARTRIDGE, who by me first being duly sworn, states on his oath as follows:

1. My name is Reese Partridge; I am an adult resident citizen of Hinds County, Mississippi; I am a licensed and practicing attorney in the State of Mississippi; and, I am a staff attorney with the Elections Division of the Office of the Mississippi Secretary of State.

2. I attended the hearings that have been held in the above matter and was a available to provide technical assistance on Mississippi election law and procedure.

3. At the hearing held during the week of July 29, 1991, I was requested by Jim Warren, counsel for the Mississippi Democratic Party Executive Committee, to review a handwritten list of changes to election procedures prepared by and suggested by Wilbur O. Colom, one of the counsel for the plaintiffs. Attached hereto as Exhibit "A" is a true and correct copy of the handwritten list of changes to election procedures prepared by and suggested by Mr. Colom. It should be noted that Mr. Colom's suggestions are written in large script (green ink on the original) while the notations in small script (blue and black ink on the original) are my comments to Mr. Colom's suggestions.

4. I reviewed Exhibit "A" initially to determine and note which Mississippi election statutes would be affected. Further, based upon my knowledge of election practices in the various counties, I made notations concerning potential difficulties in implementing some of Mr. Colom's suggestions. Finally, I noted that two of Mr. Colom's suggestions would not, in my opinion, pose any significant difficulties in implementation, to wit:

(A) Absentee ballots which arrived in the clerk's office on election day would be counted; and,

(B) Absentee voters could vote at the circuit clerk's office up to noon on Monday, September 16, 1991.

5. I then gave Mr. Warren my comments on Mr. Colom's suggestions concerning changes to election procedures as noted on Exhibit "A".

6. All of the above and foregoing is based upon my personal knowledge, and I am competent to testify to all of the matters contained in my affidavit.

/s/ Reese Partridge
REESE PARTRIDGE

SWORN TO AND SUBSCRIBED this the 29th day of August, 1991.

/s/ Jackie M. White
NOTARY PUBLIC

My Commission Expires:

My Commission Expires August 3, 1984

Absentee

No multiple applications + ballots except in writing.

- Request made by Telephone, Neighbor, Letter, Family (23-15-627)

Ballot must be returned in sealed envelope

All Absentee restrictions

635 641 . mail application and ballot together

unfortunately → 23-15-627 + ? (685)

Fed -687 641 . suspend Requirement for Separate Envelope and Ballot -631 (639?)

- ~~Absentee~~ Clerk

(5) Absentee ballots through Election day -631(c)

arrive by mail

(2) Absentee Ballots at Circuit Clerk to remain on Monday -637

Voting day must call to Locate Proper Precinct For Voter

Ballot space - should be E.C. stated for absentee voters to call

Affidavit Ballots - ?

What about mistakes

EXHIBIT "A"

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI
JACKSON DIVISION

HOLLIS WATKINS, ALICE HARDEN, AARON HENRY, EDWARD BLACKMON, JR., SAMUEL McCRAY, JACQUELINE HARPER, BEN F. BURKETT, MAC ARTHUR COTTON, and JOHN QUINCY ADAMS, on behalf of themselves and all other similarly situated, PLAINTIFFS

VERSUS CIVIL ACTION NO. J91-0364(L)

RAY MABUS, GOVERNOR OF THE STATE OF MISSISSIPPI, MIKE MOORE, ATTORNEY GENERAL OF THE STATE OF MISSISSIPPI, and DICK MOLPUS, SECRETARY OF STATE OF THE STATE OF MISSISSIPPI, members of the STATE BOARD OF ELECTION COMMISSIONERS, MISSISSIPPI DEMOCRATIC PARTY EXECUTIVE COMMITTEE, and MISSISSIPPI REPUBLICAN PARTY EXECUTIVE COMMITTEE, DEFENDANTS

THE STANDING JOINT LEGISLATIVE COMMITTEE ON REAPPORTIONMENT OF THE MISSISSIPPI LEGISLATURE; TIM FORD, in his official capacity as Speaker of the House of Representatives; GLENN S. DeWEESE, in his official capacity as President Pro Tempore of the Mississippi Senate; and THE STANDING COMMITTEE OF APPORTIONMENT AND ELECTIONS OF THE MISSISSIPPI HOUSE OF REPRESENTATIVES, INTERVENOR DEFENDANTS

DECLARATION OF EDWARD BLACKMON, JR.

I, Edward Blackmon, Jr., one of the plaintiffs in this case, pursuant to 28 U.S.C. Sec. 1746, make the following declaration:

1. I have consistently informed the defendants that plaintiffs do not wish to have the legislative elections held under the 1982 plans because those plans result in discrimination against the black voters. We did not suggest any changes in absentee voting to be used in elections held under the 1982 plans. Any changes in voting under the 1982 plan making it easier to vote by absentee ballot would have the potential of discriminating against black voters by further diluting black voting strength. Generally, more white voters vote by absentee ballot than black voters. Any voting changes which could result in more white voters voting by absentee ballot under the 1982 plan would enhance the discrimination against black voters.

2. Attached to my declaration is a true and correct copy of a letter I received from Sen. Hainon Miller dated August 26, 1991, and incorporated herein by reference.

3. I assisted the Magnolia Bar Association and the Mississippi Legislative Black Caucus in identifying black candidates for legislative elections. If I, and the organizations, had more time we would have been able to identify more black candidates for more legislative elections.

Witness my signature, dated this the 30th day of August, 1991.

/s/ Edward Blackmon Jr
EDWARD BLACKMON, JR.

I declare under penalty of perjury under the laws of the United States that the foregoing is true and correct.

/s/ Edward Blackmon Jr
EDWARD BLAC .MON, JR.

Mississippi State Senate

JACKSON

COMMITTEE ASSIGNMENTS:

Elections, Chairman
Constitution
Education
Finance
Investigate State Offices
Judiciary
Public Utilities

Joint Standing Committees on Legislative Reapportionment and Congressional Redistricting, Chairman

---

Southern States Energy Board

SENATOR HAINON A. MILLER

22nd District
Humphreys-Sharkey-Sunflower-
Washington-Yazoo Counties
P.O. Box 1334,
Greenville 38702-1334

August 26, 1991

MEMORANDUM

TO: ALL CANDIDATES FOR THE MISSISSIPPI LEGISLATURE; LT. GOVERNOR BRAD DYE SPEAKER TIM FORD

FROM: HAINON MILLER, CHAIRMAN, JOINT LEGISLATIVE COMMITTEE ON REAPPORTIONMENT

SUBJECT: PRESENT STATUS OF REDISTRICTING

This memorandum is intended to clarify some matters relating to redistricting of the Mississippi Legislature, the present litigation, and possible future events. The expressions of opinion are my own and not those of the joint committee or its counsel.

Probably all of you have read or heard, as I have, that there will be special elections for the Legislature in 1992. I have read this in the *Clarion-Ledger* and the *Washington Post*. It ain't necessarily so! The three-judge District Court for the Southern District of Mississippi, not having adopted or ordered any new redistricting plan, merely allowed the 1991 elections to proceed under the 1982 plan as a "temporary" plan. At no time in its orders, its opinion, or from the bench, did the court even once mention "one year" or "next year."

It must be obvious to everyone that the Legislature has no Constitutional authority retroactively to shorten the terms of office for which a Legislature is elected. Section 254 of the Mississippi Constitution provides that "each apportionment shall be effective for the next regularly scheduled elections of Members of the Legislature."

Therefore, if the Legislature should decide, at the 1992 regular session, to adopt a redistricting plan, its express terms would doubtless recite that it would take effect for the regular 1995 elections – not some special elections.

Section 254 of the Mississippi Constitution provides that the Legislature shall [in 1992] "apportion the state- . . . into consecutively numbered senatorial and representative districts . . . " If the Legislature adjourns without doing so, the Governor is required to call a "special apportionment session," reconvening the Legislature, within thirty days of its adjournment, for the sole purpose of adopting a joint resolution of apportionment. If the Legislature does not adopt a joint resolution of apportionment, then a commission (consisting of the Chief Justice of the Supreme Court, the Attorney General, the Secretary of State, the Speaker of the House of Representatives, and the President Pro Tempore of the Senate) shall convene and apportion the Legislature.

In any of these events, it would, of course, be necessary to obtain pre-clearance by the U.S. Attorney General, or a declaratory judgment by a three-judge United States District Court in the District of Columbia.

It is possible, I suppose, that by the time any of these things are done, the Supreme Court will have remanded *Watkins v. Mabus* to the U.S. District Court for the Southern District of Mississippi with instructions for it to order a redistricting plan and special elections; in which case, the District Court, having then before it a legislative plan approved for 1995, might order special elections under that plan.

The point is that there is no assurance that all or any of these things can or will take place within a year from now. If the District Court (and the Supreme Court) allows the full Constitutional procedures to take place and then an apportionment adopted by either the Legislature or the special commission is rejected by the D.C. Court, or the Attorney General, as the case may be, we would still have no new plan, and presumably the Mississippi District Court would then proceed to draw a plan and set dates for a special election.

In my opinion, while it is possible that new elections might be required in 1992, it is unlikely that this matter can be resolved that soon, and it is not impossible that members elected in 1991 might serve the full four-years term without special elections (although I do not expect that to happen either).

UNITED STATES DISTRICT COURT FOR
THE SOUTHERN DISTRICT OF MISSISSIPPI
JACKSON DIVISION

WATKINS, HOLLIS, ET AL.

VS. CIVIL NO. J91-0364(L)

MABUS, RAY, GOVERNOR OF THE
STATE OF MISSISSIPPI, ET AL.

TESTIMONY OF ALLAN LICHTMAN

BEFORE: JUDGE RHESA H. BARKSDALE
JUDGE TOM S. LEE and
JUDGE CHARLES PICKERING,
UNITED STATES DISTRICT JUDGES

DATE: JULY 30, 1991

PLACE: JACKSON, MISSISSIPPI

REPORTED BY: CHERIE R. GALLASPY
REGISTERED PROFESSIONAL
REPORTER and CERTIFICATE
OF MERIT

---

245 E. Capitol Street, Room 518
Jackson, Mississippi 39201
(601) 965-4410

[p. 1] JUDGE BARKSDALE: Mr. Rhodes, do you want to call the witness?

MR. RHODES: Yes, your Honor. I would call Mr. Allan Lichtman.

JUDGE BARKSDALE: Mr. Rhodes, it would assist the court, we have Dr. Lichtman's affidavit, Declaration of Allan J. Lichtman, which has been labeled as

Plaintiff's Exhibit 10, that was filed last July 24th, and then – so that's labeled, and we have that before us with his various qualifications, et cetera. If you would just simply tell the court briefly why he's being called and what he's going to testify on – we don't want to cut you or Dr. Lichtman off. On the other hand, maybe we can serve justice best by knowing in advance what we're doing and can shorten it a bit.

MR. RHODES: Your Honor, we were going to ask – let Dr. Lichtman be qualified as an expert in the areas of the analysis of racial voting patterns, socio-economic characteristics and minority vote dilution.

JUDGE LEE: Do any of the parties take issue with Dr. Lichtman's qualifications? It can be admitted, then, that he is qualified as an [p. 2] expert. We have the affidavit which we have read.

MR. RHODES: Your Honor, we have a separate resume' that we could offer as an exhibit.

JUDGE BARKSDALE: What is the purpose of his testimony, Mr. Rhodes?

MR. RHODES: Your Honor, Dr. Lichtman is going to testify that he has – we also have his report or affidavit, his report that we would like to offer as an exhibit as well.

JUDGE LEE: For the clerk and record's benefit, the first one can be Exhibit P-1, the second one P-2?

THE CLERK: P-27 is the first one, and P-25.

JUDGE LEE: All right.

MR. RHODES: Your Honor, we were going to ask Dr. Lichtman about his familiarity with election history and election returns in the state of Mississippi, his analysis of the election histories and election returns and voting patterns by race and what percentage of the black population needed to be in a particular district in order for a black candidate to have an equal chance of being elected; if he analyzed the 1982 [p. 3] plan, how many of those districts would contain the percentages necessary in order for black candidates to have an equal chance of being elected.

JUDGE BARKSDALE: This is the 1982 plan as populated by the current population, in other words, under the 1990 census?

MR. RHODES: Yes, your Honor. We're going to ask him about the '82 plan under the '80 census and the '82 plan under the '90 census.

JUDGE BARKSDALE: As I understand it, his testimony is only being offered concerning this court's possible use of the '82 plan, all other plans failing. I would ask you to limit it to that. We're not here receiving proof on your overall complaint.

MR. RHODES: Yes, your Honor. Your Honor, although – we know his resume' or vitae was admitted into evidence without any objection. I would need to ask him certain questions about his experience in analyzing racial voting patterns within the state of Mississippi.

JUDGE BARKSDALE: No, sir. I think we can read the vitae and we can read his report. We're asking you to please and get to the meat of [p. 4] the coconut and

ask him to testify about the '82 plan under the current 1990 population. That's what we need to hear about.

MR. RHODES: Yes, sir. Along that line, your Honor, I do have some more exhibits, if I could get them in order.

JUDGE BARKSDALE: All right.

MR. RHODES: Your Honor, I have three more exhibits. Opposing counsel have been furnished copies. One is a table containing the population of the state by race and by county.

JUDGE LEE: What number is that?

MR. RHODES: We premarked it as P-1.

JUDGE BARKSDALE: Does this correspond to your exhibits attached to your complaint?

MR. RHODES: Yes, your Honor. We did not attach this exhibit.

JUDGE BARKSDALE: Yes, sir. Is it the same –

MR. RHODES: The other two we did.

JUDGE BARKSDALE: All right.

JUDGE PICKERING: Exhibit list of your plaintiff is the same one described there?

MR. RHODES: Yes, sir.

JUDGE BARKSDALE: Okay. That's received.

[p. 5] MR. RHODES: And the next one is the current 1990 census population for current Senate districts, and we premarked it as 2.

JUDGE BARKSDALE: That's P-2. That's an exhibit to your complaint?

MR. RHODES: Yes, your Honor.

JUDGE BARKSDALE: All right.

MR. SAUNDERS: Excuse me, your Honor, so the record is correct, I think P-2 is based on the 1980 census, not 1990.

JUDGE PICKERING: I thought P-2 was the 1990 population table for the 1982 senate districts.

JUDGE BARKSDALE: Why don't you confer with Mr. Saunders and let's move this along.

MR. SAUNDERS: There's no objection to this P-2.

JUDGE BARKSDALE: How about P-3?

MR. SAUNDERS: No objection to P-3.

JUDGE BARKSDALE: Thank you.

MR. RHODES: Your Honor, the next one is – the next exhibit, your Honor, is premarked P-5. It's the current Senate districts based upon the 1980 population, census population.

JUDGE BARKSDALE: All right.

[p. 6] MR. RHODES: There's one other exhibit. We can get that one a little later. I can go ahead and start examining Dr. Lichtman.

JUDGE BARKSDALE: All right.

ALLAN LICHTMAN,

having been duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. RHODES:

Q. For the record, would you state your name.

A. Allan J. Lichtman.

Q. Dr. Lichtman, are you familiar with the state of Mississippi in any regard?

A. Broadly familiar with voting patterns in Mississippi, particularly with respect to the last 20 years, black versus white contests for various offices held in various parts of the states, particularly in the Delta and Hinds County area.

Q. Have you analyzed those voting patterns?

A. I have extensively analyzed voting patterns from many scores of elections in many counties in Mississippi, in various judicial circuits and in the second congressional district as well.

Q. Dr. Lichtman, have you – do you have an [p. 7] opinion of analyzing voting patterns by race in the state of Mississippi over the last 20 years as to whether or not whites in Mississippi vote along racial lines in contested elections?

A. Yes, I do have an opinion.

Q. What is that opinion?

A. My analysis, as I said, of many scores of elections in various parts of the state for a variety of public offices over a 20-year period show a very strong block vote on the part of white voters for white candidates in black versus white contests, typically on the order of 90 percent block voting for the white candidates or more, which typically means a crossover vote available to the black competitors in those contests of some 10 percent or less.

Q. And have you also performed the same analysis with respect to black voters?

A. Yes. You would call that analysis of black cohesion, and I have found that generally in these elections I have looked at in black versus white contests, black voters are cohesive. That is a very substantial majority of black voters in these elections unite behind the black candidates in black versus white contests.

[p. 8] While on the average black cohesion is not quite up to the 90 percent level of block voting, you still have very strong black cohesion in general. Generally in the range of 75 percent or more of the black electorate united behind black candidates in these black versus white contests.

Q. What methodology did not use in performing your analysis?

A. I used the same standard methodologies in the field, political analysis that were used by plaintiffs' expert in the Supreme Court case, Thornberg vs. Jingles, and then I have used myself as an expert for plaintiffs, defendants and the Justice Department in some 40 voting

rights cases. And then I have published about extensively in my writings. And this is two methods: One, ecological regression analysis, a statistical procedure designed to look at all the precincts covered within an election and to statistically estimate, say, for demographic groups like blacks and whites, the percentage of those demographic groups voting for the various candidates.

The second procedure is not an estimating procedure. It is sometimes called extreme case analysis, and by that procedure, you actually look [p. 9] at what actually happened in the most heavily black and in the most heavily white precincts to determine the vote for the black candidate in the heavily black as opposed to the vote for the black candidates in the heavily white precincts. Often in Mississippi, typically you have white precincts of over 90 percent, sometimes black precincts of over 90 percent, usually black precincts well over 70 percent; and both of those complimentary methodologies sustain the findings of strong block voting by whites and strong cohesion on the part of black voters.

Q. I was going to ask you if you had an opinion whether or not blacks in the state of Mississippi are politically cohesive?

A. It's no question that blacks in the state of Mississippi are politically cohesive.

Q. In performing your analysis, have you ever had an occasion to perform that analysis with respect to what type of remedy would be appropriate if a court had found that a particular election scheme or election mechanism was discriminatory against black voters?

A. Yes. Consistent with procedures I have utilized in other cases, I did, in fact, in [p. 10] conjunction with the Martin and Kirksey v. Allain litigation, the judges case, perform such an analysis which took into account all of the various factors that go into electability on average and came up with an estimate on average for the various counties included within that lawsuit of what would be a rough projected black population percentage needed to provide the black voters an opportunity to elect candidates of their choice.

Q. And what was the population percentage that you concluded is needed in order for black candidates to have an equal chance of being elected?

A. Taking into account the block voting we have just described, taking into account differentials in turnout rate between whites and blacks, which likewise go into the equation – it's not just a matter of how cohesive blacks are, how much crossover they get. It's also a matter of what percentage of black population versus the white population can be mustered to the polls – and taking into account in addition the different age distributions of the groups – you always have a drop off between black percentage of total [p. 11] population and black percentage of voting age population. It's a drop off of approximately five percent on average.

My conclusion was that in these areas, which were Delta counties and Hinds County, on average you needed a population percentage of some 68.5 percent. So you needed a population percentage, that's total population, in the high 60s, which would translate into a voting age population in the low '60s. Mind you, that is an average;

and it does take into account various counties with somewhat different characteristics.

Q. Are there any other factors – are there any factors, at least, that affect the ability to turn out to the polls and the ability to elect, such as socioeconomic characteristics?

A. Clearly in addition to simple turn-out figures and voting figures, the ability of any demographic group in a competitive political situation to elect candidates of their choice will also depend upon factors that you cannot simply plug into an equation of the type I utilized. And, of course, as is well known as a political historian and a political analyst, socioeconomic factors are very relevant. They, briefly put – [p. 12] without going into a long explanation, they directly bear on the political resources in terms of money, experienced personnel, high profile candidates, organizational experience, office space, you name it, that a candidate could draw upon. So the socioeconomic status of the communities from which the candidates come is certainly likewise of relevance in examining electability in any district.

Q. Are you familiar with the socioeconomic characteristics by race in Mississippi?

A. I am.

Q. Could you tell the court what those characteristics are by race or whether or not they are equal or whether or not there is any disparity.

A. Briefly put again, because anyone can look at the data, there are major disparities between whites and blacks; and all of the standard socioeconomic indicators

that one would look at, educational attainment, income, poverty levels, telephones and vehicles available, white collar employment. On all of these indices, statewide there are major disparities with whites generally ranging much higher in those indices than blacks. [p. 13] Sometimes the disparities are extremely great. For example, in the crucial poverty measure, the black poverty rate is three times the white poverty rate in Mississippi.

All of this data was outlined in the 1980 census, and I have seen updates of that for the mid 1980s based on analysis of computer tapes produced by the current population survey of the United States Bureau of the Census. And although the 1990 data is not out yet, I did not see any marked changes between the 1980 data and mid 1980 data in these indices. As of, say, 1984, blacks were still substantially behind whites on the critical indicators of socioeconomic standing.

Q. Have you performed any studies as to voter registration rates by race in the state of Mississippi?

A. Yes. In conjunction with – I believe the case was styled Operation Push versus Allain, which was a challenge to certain registration practices, I understand, in the state of Mississippi, I was asked to perform a study to determine whether or not there were significant disparities in the rates at which blacks and whites were registered in Mississippi.

[p. 14] In conjunction with that study, I had to demonstrate that, in fact, the survey taken by the U.S. Bureau of Census was not reliable, not because of any areas or problems of the survey or anything wrong with the census but for reasons I went into extensively in the – my

report, because of the self-reporting character of whether one is registered or not. I also had to cope with deficiencies in the data kept county by county in Mississippi, which is usually not kept by race and is often not purged to be up to date.

As a result, I turned to an additional form of analysis. I'm not going to go into the whole procedure that I performed but fundamentally, I looked at returned jury questionnaires which are a random sample from the voter registration rolls, identified by race and controlled for people who move or die and thus become ineligible.

It was on the basis of that extensive amount of data from 1981 mailings to 1985 mailings that I was able to estimate that from 1980 to '84, there was approximately a 25 percentage point registration gap between whites and blacks. That is, the white registration rate was 25 points higher than the black registration rate and from [p. 15] 1985, that the gap was similar at 22 percent. That study has since been accepted for publication and will appear momentarily in the next issue of the Journal of Law and Politics put out by the University of Virginia law school.

Q. Was that study accepted by any court?

A. It's my understanding that that study was accepted by the district court and by the court of appeals.

Q. That's Push versus Allain?

A. Push versus Allain.

Q. Now Push versus Mabus, I believe. Have you reviewed the current population for – the 1990 population for the current Senate districts for the state of Mississippi?

A. Yes, I have.

Q. Have you also reviewed the April 30th, 1991, census – Senate reapportionment plan that was submitted to the United States Attorney General and that was objected to by the United States Attorney General?

A. Yes.

Q. In the current districts, the 1982 districts, with the 1990 census population, how many black majority districts are there?

[p. 16] A. Well, what I looked at was not just 50 percent black majority districts.

Q. Could you tell the court what categories you looked at.

A. Remember my finding was it took 68.5 percent total population, which would translate into something in the low '60s in terms of voting age population. I indicated that was, of course, a projection that could differ in some areas and more urban areas. For example, as was commented upon indeed in the Department of Justice letters, there may be a more active black electorate in which case you could go down a bit below the 68.5.

In more rural areas and larger districts, particularly in the Delta area, you may have to go up a little higher, perhaps to the 70 percent total pop, 65 percent voting age population. That concludes –

Q. They did that by race?

A. By race. That conclusion is, in fact, consistent with a document that was recently provided to me which

is a memo from Reuben V. Anderson who is a former Supreme Court Justice of the Mississippi State Supreme Court and former counsel, I understand, to the Committee on [p. 17] Reapportionment, and which totally independently what I came up with, he indicates that districts in the Delta should contain a 65 percent black voting age population or more, which is consistent with my finding of perhaps around 70 percent for Delta districts, perhaps around 65 percent for more urban districts.

JUDGE BARKSDALE: Let me just ask a question, Mr. Rhodes. Is this the same memorandum as is marked Plaintiffs' Exhibit 13 that is dated April 18, 1991 that was submitted with the package?

MR. RHODES: No, your Honor. We're getting ready to offer that memorandum. It's dated April 25, 1991.

JUDGE BARKSDALE: Does it have written on it, as does the April 18th memorandum, "confidential attorney client information"?

MR. RHODES: Yes, your Honor, it does.

JUDGE BARKSDALE: Then how on earth can it be offered in this court when it's marked – labeled "confidential attorney client information," which I understand Mr. Anderson was acting as an attorney for the Joint Standing Committee – for the Joint Legislative Committee?

[p. 18] MR. RHODES: Your Honor, we are taking this witness out of turn. Although Mr. Anderson offered that memorandum as the attorney for the Joint Legislative Reapportionment Committee, that committee

members of it subsequently made it public and was submitted to the United States Department of Justice by the state of Mississippi as part of its submission package, and they have since disseminated that information.

JUDGE BARKSDALE: They have waived the privilege?

MR. RHODES: Yes, your Honor. They have waived the privilege.

JUDGE PICKERING: What number is it?

MR. RHODES: Your Honor, we have it marked as Plaintiffs' Exhibit 11.

BY MR. RHODES:

Q. Dr. Lichtman, how many black majority districts by category were you able to come up with in the present – the existing 1982 plan using 1990 census population?

A. Right. Given the analysis that I have just talked about, supplemented by what I have seen of the Anderson memo, taking a liberal view that would give blacks opportunity to elect candidates [p. 19] of their choice, which is my understanding what I was supposed to be looking at here was districts that would give it, I decided that obviously the most relevant ones would be total population of 65 percent or more, translating into a voting age population of about 60. And secondarily I would also look at those that are between 60 and 64 percent. These are all rounded numbers in total population corresponding to something between about 55 and 60 percent in voting age population.

So those are the two categories by which I analyzed plans. And looking at the current House plan based on 1990 data, I found there were 20 districts with a total population of 65 percent or more in round numbers and six districts that were in the 60 to 64 percent range.

JUDGE PICKERING: How many in the 60 to 64?

THE WITNESS: Six.

BY MR. RHODES:

Q. That's the black population?

A. This is all black population that we're dealing with.

JUDGE BARKSDALE: This is black population or black voting age population?

[p. 20] THE WITNESS: This is black population. As I said, you take about 5 percent in terms of VAP.

JUDGE BARKSDALE: That's 20 with more than 65 percent, and six between 60 and 64 percent?

THE WITNESS: 65 or more, 20. That's correct, your Honor. And 60 to 64.

JUDGE BARKSDALE: And that's using the current '82 plan as populated now under the 1990 census?

THE WITNESS: That is exactly correct, your Honor.

JUDGE BARKSDALE: Thank you.

BY MR. RHODES:

Q. Did you also analyze the percentages of black population in the plan that was objected to by the United States Attorney General for the House of Representatives?

A. I did, on an exactly comparable basis using the same categorization.

Q. What were the percentages in the rejected plan?

A. Twenty-seven at 65 percent or more, and two at 60 percent or more, for a total of 29 as [p. 21] compared to 26 for the current and 27 at the 65 percent level compared to 20 for the current.

Q. Did you perform the same analysis for the present, the existing 1982 Senate districts using 1990 population?

A. I performed exactly the same analysis using the same categorization for the current plan and came up with –

JUDGE BARKSDALE: Wait. I'm sorry. I thought we had just talked about the Senate. Were we talking about the House?

MR. RHODES: Excuse me. We are talking about the House. We just finished talking about the House.

JUDGE BARKSDALE: We have just talked about the House?

THE WITNESS: Yes, your Honor. Shall I proceed?

JUDGE BARKSDALE: Please.

A. On the Senate, 65 percent plus is four, and 60 to 64 is four.

BY MR. RHODES:

Q. That is under the 1990?

A. 1990 current plan, 1990 census data apportioned among the current Senate districts.

[p. 22] Q. And did you perform the same analysis for the plan that was objected to by the United States Attorney General?

A. Yes. And I found nine in the 65 percent plus category and one in the 60 to 64. So that's a total of ten compared to eight and nine in the 65 percent plus category compared to four in the 65 percent plus category for the current Senate plan.

Q. Dr. Lichtman, are you familiar with the term or the phrase minority vote dilution?

A. I am indeed.

JUDGE PICKERING: Minority vote what?

MR. RHODES: Minority vote dilution.

BY MR. RHODES:

Q. Could you tell the court what minority vote dilution is.

A. Minority vote dilution is something that operates at the level of political systems and at the level of voter groups as a whole as opposed to at the level of individual

voters. And in essence, minority vote dilution takes place whenever you have an electoral system that has the effect of impeding the full opportunity of minority voters to be able to elect candidates of [p. 23] their choice.

Typically you get voter dilution under two circumstances, political historians have found, one is the at-large context when minority voters are submerged within, say, a majority white jurisdictions and as a result can elect candidates of their choice. And, secondly, in the districting context where districts are configured in such a way as to have the effect of making it less likely than could be so otherwise for minority voters under a districting system to be able to elect candidates that they prefer.

MR. WALLACE: Your Honor, we don't object to that as long as the witness is talking sociology. If that's supposed to be a legal opinion as to what Section 2 means, we would object to it that extent.

JUDGE BARKSDALE: Okay.

MR. RHODES: We were not offering that as a legal conclusion.

BY MR. RHODES:

Q. Dr. Lichtman, do you have an opinion under which plan, the rejected House plan or the 1982 House plan, which plan would impede the ability of black voters to elect the candidates of their [p. 24] choice?

A. I presume we're speaking relatively here –

Q. Relatively.

A. – in the sense one could take two systems and compare them on these standards I just outlined. And

give my previous analysis of electability and given the clear difference in the composition of the black districts in what we call the current plan and the plan that was objected to by the Department of Justice it's clear that the plan that was objected to by the Department of Justice provides greater opportunity for minorities in this state to elect candidates of their choice; and, therefore, on a comparative basis, the current plan would be dilutive of minority voting strength using the definition as a political historian I gave you.

JUDGE PICKERING: Mr. Rhodes, just so the record is complete, you do agree or you have stated it is your position that legally there's no way this court could adopt the 1991 plan that was not precleared. Is that correct?

MR. RHODES: Yes, your Honor. That is our position.

JUDGE BARKSDALE: PICKERING: And then [p. 25] the 1982 plan might have some objection to it; but as far as the cases I have seen, the court has got to fashion an equitable remedy with little disruption and still meet the basic needs of the plaintiffs when they establish a constitutional violation or statutory violation. Is that not correct?

MR. RHODES: Yes, your Honor.

JUDGE PICKERING: As far as the 1982 plan, the court has got discretion. As far as the 1991 plan, the court has absolutely no discretion.

MR. RHODES: Your Honor, if plaintiffs prove that the 1982 plan dilutes black votes, then the court has

no discretion as to using the 1982 plan. Under Jordan versus Winter, which was affirmed by the United States Supreme Court and Brooks versus Winter stated that if a plan violates Section 2, the court cannot implement that plan as an interim plan. The court can not use the 1982 plan for these elections if plaintiffs prove a Section 2 violation.

JUDGE PICKERING: Even under an interim plan?

MR. RHODES: Even under an interim plan.

JUDGE PICKERING: That is contrary to [p. 26] what is found in Chisolm versus Roemer, which is a more recent Fifth Circuit opinion, is it not?

MR. RHODES: Your Honor, that is what the United States Supreme Court – in that case, they labeled it Section 5 issues there, not a Section 2 problem. And in that case, the three judge district court did allow elections to go on for judges, although the statutes implementing those additional judges had not been precleared.

JUDGE PICKERING: Wasn't that a Section 2 claim?

MR. RHODES: I was talking about Clark versus Roemer. Under Chisolm versus Roemer, the only issue that went up was whether or not Section 2 applied to the election of judges.

JUDGE PICKERING: That went to the United States Supreme Court, but the Fifth Circuit made a pronouncement there. The Fifth Circuit was the one that reversed the three judge district court and enjoined the election.

MR. RHODES: Yes, your Honor.

JUDGE PICKERING: And the Fifth Circuit vacated that and directed that the elections should proceed.

MR. RHODES: Yes, your Honor. But the [p. 27] Fifth Circuit ultimately found that Section 2 did not apply to the election of judges.

JUDGE PICKERING: Not in that particular case. It was in the same case, but it was on a subsequent deal.

JUDGE BARKSDALE: I would suggest, Mr. Rhodes, that when this testimony is concluded, as soon as you can, provide either just the cites to the cases and the pinpoint cites to where the pronouncement is found that are you relying on in your brief, memorandum.

MR. RHODES: I can provide the pinpoint cites to the cases as soon as this witness is completed.

JUDGE BARKSDALE: Just put it on a sheet of paper and deliver it to Judge Lee's office and we'll get it.

MR. RHODES: Yes, your Honor.

BY MR. RHODES:

Q. Dr. Lichtman, I would like to ask you the same question with respect to the 1982 Senate plan and the plan that was objected to by the United States Attorney General. We just talked about the House plan.

A. In the rejected Senate plan, there were nine [p. 28] 65 percent plus and one 60% plus. That ten compared

to eight with respect to the current plan and nine compared to four with respect to 65 percent plus.

Q. Under which plan, the objected to plan or the '82 Senate plan, would black voters have greater opportunity to elect candidates of their choice?

A. Again the numbers clearly speak for themselves on this. The rejected Senate plan would provide blacks greater opportunity to elect candidates of their choice when compared to utilizing the current lines under 1990 population.

Q. Under the converse of that, which one would impede the ability of black voters to elect candidates of their choice?

A. In comparison then, the utilization of the current Senate lines as compared to the rejected plan would have, as I described, the same effect as using the House plan to dilute minority voting strength and impede the ability of minorities to elect candidates of their choice.

Q. Did you also perform any analysis as to the plan for the Senate that has been offered by the plaintiffs that has been called the least changed [p. 29] plan, the plan that was prepared July 27th, 1991?

A. You presented me a plan which you did indeed label the least changed plan. I did perform a similar analysis for both the Senate and the House.

Q. For the plans that the plaintiffs presented to you for the Senate, how many black majority districts –

JUDGE PICKERING: Mr. Rhodes, so I may understand exactly what you're talking about, you're

talking about the one that the plaintiffs presented, and it's not one that's been agreed to by anyone other than the plaintiffs?

MR. RHODES: Yes, your Honor.

JUDGE PICKERING: The one that they presented, and it's one that – I assume was the one you're refusing to is still being considered in negotiations.

MR. RHODES: Yes, your Honor.

JUDGE BARKSDALE: This is the plan that you submitted on July 26th for the House and 27th on the Senate?

MR. RHODES: Yes, your Honor.

BY MR. RHODES:

Q. You could start with the Senate plan if you [p. 30] can perform the same analysis.

JUDGE BARKSDALE: How would this bear on our using the '82 plan for a temporary election?

MR. RHODES: Your Honor, it would show that the '82 plan results in discrimination against black voters. It dilutes black voting strength when compared to the plan that is being offered by plaintiffs. We agree that the plan that was objected to by the United States Attorney General cannot be used because it is an unprecleared plan. But we also want to show that even under a plan that really no pronouncement has been made on by the United States Attorney General as of yet, that that plan when compared to the '82 plan, that the '82 plan dilutes black voting strength.

JUDGE BARKSDALE: It's going to simply be another summary of black population –

MR. RHODES: Yes, your Honor.

JUDGE BARKSDALE: – and comparing the numbers?

MR. RHODES: The electability that Dr. Lichtman had been talking about.

JUDGE BARKSDALE: I think that's already in the record. But if you think you need to state [p. 31] it again, we can hear it.

MR. RHODES: If I could just ask him his conclusion as to which plan, the 1982 Senate plan or the plaintiff's least changed Senate plan, would dilute black voting strength.

A. The plaintiffs least changed plan provides even more minority districts in the 65 percent plus and 60 percent range than the rejected Senate plan and therefore, obviously by comparison to the current Senate plan provides greater opportunities for minorities to elect candidates of their choice.

BY MR. RHODES:

Q. Do you have a conclusion with respect to the plaintiffs' least changed House plan when compared to the 1982 House plan?

A. Same thing with the least changed House that again provides yet more of those type of minority districts than does the rejected House plan. And, therefore,

obviously by comparison to the current House plan provides greater opportunity for minorities to elect candidates of their choice.

JUDGE PICKERING: Just simply give the numbers without any – 65 percent more in the [p. 32] Senate How many?

THE WITNESS: In the Senate it's ten.

JUDGE PICKERING: In the 60 to 64 in the Senate?

THE WITNESS: Two.

JUDGE PICKERING: 65 to – 65 percent or more in the House?

THE WITNESS: Thirty-one.

JUDGE PICKERING: 60 to 64 in the House?

THE WITNESS: Three.

MR. REEVES: May it please the court –

JUDGE BARKSDALE: How many in the Senate between 60 and 64?

THE WITNESS: Two.

JUDGE BARKSDALE: That's a total of 12?

MR. RHODES: Your Honor, for the record –

JUDGE BARKSDALE: Mr. Reeves.

MR. REEVES: Your Honor, by way of clarification, could you just assist us now. Mr. Rhodes asked the witness a moment ago about the least changed plan. And

as we understand it, the least changed plan is the plan filed late Friday afternoon. However, I understood, I thought, Judge Pickering to inquire as to whether [p. 33] or not that was the plan that was on the table for negotiations. So we're a little bit confused and want to make sure that everybody understands what we're talking about. Perhaps we are, in fact, confused.

JUDGE BARKSDALE: I think the record is clear. The least changed plan, as I asked Mr. Rhodes, is the plan he filed July 26th for the House at 5:00, July 27th for the Senate at 10:15.

MR. REEVES: With no amendments.

JUDGE BARKSDALE: He filed what he filed, Mr. Reeves He filed a plan for House at 5:00 on Friday, July 26th. He filed a plan on Saturday at 10:15, delivered it to my chambers on July 27th for the Senate.

MR. REEVES: I understand. As I understand your earlier statement yesterday, the plans for consideration at least would be the July 11 plan – the July 23rd plan that the state put forth. The July 26 plan would be offered by way of evidence, I guess. I presume that's what he's doing now.

MR. RHODES: Your Honor, I'm just asking this witness about the minority vote dilution when comparing plans.

[p. 34] MR. REEVES: I understand the context.

JUDGE BARKSDALE: We have never until, Mr. Reeves – and I think at this record is very clear on this. We have never until late this morning stated that the July 11 plan – we'll call it the House plan – was to be reviewed

by the court-appointed expert. I understand that's what they are doing now and will testify about tomorrow morning at 9 o'clock.

MR. RHODES: Your Honor, we have a plan that we would like to mark as an Exhibit P-17 as the least changed Senate plan, map and the data together.

JUDGE PICKERING: What Exhibit Number is that?

MR. RHODES: P-17.

JUDGE PICKERING: Is that on your exhibit list?

MR. RHODES: Yes, your Honor.

JUDGE PICKERING: That was the one filed July 26th?

MR. RHODES: 27th. That was the Senate. The House is P-18, and it was filed July 26th.

JUDGE PICKERING: You're offering both of those?

[p. 35] MR. RHODES: Yes, sir.

JUDGE BARKSDALE: As I understand it, we have just received into evidence, again, the plan that you filed yesterday and Friday for the House and for the Senate. Is that correct?

MR RHODES: Yes, your Honor.

(Exhibit P-17 and P-18 marked.)

JUDGE BARKSDALE: Mr. Rhodes, I had understood that this witness was here to talk about problems

with the '82 plan. I think now that you're now getting over into your least changed plan, that's outside what the court understood Mr. Lichtman – Dr. Lichtman, excuse me, Doctor – was going to testify about this morning. And it's unfair to the counsel who aren't here.

We're hearing testimony from Dr. Lichtman restricted to what is wrong with the 1982 plan. I believe he's already presented it. He's taken and simply shown us what we can all see from the charts, how many districts have certain populations. So I would ask you, sir, to stay within the guidelines we set for Dr. Lichtman's testimony as to what's wrong with the '82 plan. We don't need testimony from Dr. Lichtman about [p. 36] your least changed plan as is now yet being negotiated even more. You have negotiated away from that over the weekend and left the House committee in the lurch. So let's stick with what's wrong with the '82 plan, please.

MR. RHODES: Your Honor, trying to keep the record straight, we wanted to – we were offering this to show a comparison between the rejected plan and the '82, which plan provided for more electable blacks. That's the only reason we were offering it.

JUDGE BARKSDALE: I don't believe it's relevant. What's relevant is: Is something wrong with the '82 plan. Anyone can come up with a plan more favorable to any group than the '82 plan if they just want to. What we're talking about is – I'm certainly subject to Judge Lee or Judge Pickering having a different view. I understood what we're talking about is what's wrong with the '82 plan, if this court is forced to use this for an interim measure. It's clear that every plan that's been introduced

by every party is different from the '82 plan. That's all in the record.

MR. RHODES: We could have used any of those plans for comparison. We just picked out [p. 37] one to use. Your Honor, in putting on the full extent of our Section 2 case, we wanted to put on that part about comparative analysis as well as all those other factors that the court says to prove a Section 2 violation.

JUDGE BARKSDALE: I don't believe we're having a Section 2 case right now. This court is trying its best with the little amount of time remaining to fashion a remedy that's as fair as possible to everyone, and our options have been taken away from us day by day. So what we're trying to do now is do what we, as a court of equity, can do. And one of the considerations is the '82 plan, and we would appreciate Dr. Lichtman's testimony on the '82 plan unless, of course, Judge Lee or Judge Pickering wants other testimony from him on other plans.

MR. RHODES: Your Honor, we were not offering him testimony as going to any remedy. The only thing in Jordan versus Winter, the three judge court specifically stated that a plan cannot be used as an interim plan if it violates Section 2. And we were using – we could use any other plan as a comparison to show that the '82 plan dilutes black voter strength when compared,

* * *

UNITED STATES DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF MISSISSIPPI
JACKSON DIVISION

WATKINS, HOLLIS, ET AL.

VS. CIVIL NO. J91-0364(L)

MABUS, RAY, GOVERNOR OF THE
STATE OF MISSISSIPPI, ET AL.

TESTIMONY OF WAYNE PARKER, JOE MARTIN,
RUTH SHIRLEY, DEBORAH DUNN, HENRY KIRKSEY
AND JINAKI HALL

BEFORE: JUDGE RHESA H. BARKSDALE
JUDGE TOM S. LEE and
JUDGE CHARLES PICKERING,
UNITED STATES DISTRICT JUDGES

DATE: JULY 31, 1991

PLACE: JACKSON, MISSISSIPPI

REPORTED BY: CHERIE R. GALLASPY
REGISTERED PROFESSIONAL
REPORTER and CERTIFICATE OF
MERIT

---

245 E. Capitol Street, Room 518
Jackson, Mississippi 39201
(601) 965-4410

* * *

[p. 4] WAYNE PARKER,
having been duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. MOORE:

Q. Tell us your name, please.

A. Wayne Parker, Lamar County.

Q. All right. You occupy a position of – an elected position in Mississippi. What is that?

A. Circuit clerk.

Q. And what House district and Senate district are you in, just for the record?

A. I don't know.

Q. What were you in in 1982?

A. 101 and 92 – 101 is my district?

Q. Is the House district?

A. House district. Senate, 40 – I don't remember all of that. 45 and 43, I believe.

Q. All right. You occupy a position as the [p. 5] president of the –

MR. MOORE: Your Honor, I'm going to lead a little bit to get to the facts.

JUDGE BARKSDALE: Please do that.

BY MR. MOORE:

Q. You occupy a position as the president of the Circuit Clerks Association in Mississippi. Is that correct?

A. Yes, I do.

Q. How long have you been a circuit clerk in Lamar County?

A. Twenty years.

Q. So you have a lot of experience holding many elections. Is that correct?

A. Yes.

Q. Tell the court, if you will, in practical terms – as we discussed before, A, B, C, if you can, about what the clerks do when you have split precincts, what problems – practical problems it causes you having split precincts. If I may expand it, your Honor, split precincts not only in legislative races and Senate district lines. But when you have the extra problem of redistricting and supervisor districts, maybe justice court districts, school board districts, those type [p. 6] things, if you could expound on that first?

A. Well, time is the main thing on creating subprecincts on split precincts. We have got 12 in our county now, and we had plenty of time when we created them.

Q. Twelve what?

A. Subprecincts in our county. Subprecincts takes a lot of time. You have to go out physically – our election commissioners and my staff – and locate people. We are a rural county, and we have to – even in Purvis where I live, 90 percent of the town is on rural route, routes and box numbers.

Q. What particular problem does that cause?

A. Well, in this year when we started under a new plan trying to locate people, we found people had moved

across the street. And normally you got odd on one side, even numbers on the other side. They moved across the street kept their same old box number. We have our computer programed to handle odd and even, but then we hit a lot of these this year.

Q. So someone –

A. Somebody has got to physically go out and not look at box numbers but go knock on doors and [p. 7] get names.

Q. That's so that the circuit clerk can ascertain who is in which precincts?

A. Which precinct.

Q. So the split precincts complicates that problem?

A. Complicates it. Since we got our House and Senate plan approved, I believe the 2nd of July, my staff has been – and election commission has been working Saturday and Sunday and at nights. And all we do is sitting there holding it before we dump it in the computer waiting on the House and Senate plan. We have to change it back when we get subprecincts.

Q. What about costs for counties such as Lamar or for other counties in Mississippi, costs involved in handling split precincts?

A. Cost is just – you know, there's no way really to figure it until we get a plan. And the more we got, the more it's going to cost us. Just like a Purvis precinct under one of these plans would probably take about a week to do, and that's, of course, election commission

making $50 a day and my staff got probably three people handling it on computer and on the road.

[p. 18] * * *

JUDGE PICKERING: What does the time factor mean to you?

THE WITNESS: If I had a plan today, in three weeks I could be ready to order my ballots. I would have all of my people transferred and ready to order my ballots there. And you can't order your ballots until you know how many people is in your precincts because they are all – your ballots are all coded that we use. So you have got to know the number of people in your precincts, have them transferred. We notify –

JUDGE PICKERING: How long will it take you to get your ballots?

THE WITNESS: This list, I think, of the Secretary of State is probably pretty accurate. From 12 to 16 days, that's probably pretty accurate, provided we have got all of our precincts and know all the information to give them and do our ballot faces.

BY MR. MOORE:

[p. 19] Q. If you used – if the time got short, which the time is short, if you used paper ballots, what kind of time problem are we in there?

A. I can do – if I had all my candidates, everybody transferred, I could have paper ballots with my printer in probably four or five days. I can do the ballot faces in one day, get them to the printer and he could have them back to me in two or three days.

JUDGE PICKERING: Then the voter is going to have to vote with paper ballots and the returns are going to be later coming in?

THE WITNESS: We would have to have poll workers. That part would be a little more expensive, but then we would cut down and save money by the money – see, it costs a lot more money to handle with the computers there.

JUDGE PICKERING: How long have you been using the computer?

THE WITNESS: I believe we have had ours about five years.

BY MR. MOORE:

Q. What problems with absentee ballots?

A. Absentee ballots – it's impossible for them to get them. We are supposed to have them 45 days [p. 20] before the election, which is Saturday. So it is impossible to do absentee ballots on our scanner now. We're going to have to do them by paper ballot. And the law says that they are supposed to be or shall be the same form and size. But at this point, it's impossible for us to do it.

Q. What about – we talked about the voting machine. Any other problems with the voting machine ballots as far as the time? You said 12, 16 days.

A. Yeah.

Q. That's about it?

A. That is provided we had everything – everybody transferred, notified as to the precincts today, we could have it done in 16 days.

Q. Do you have any comments for the court as far as, say, a plan was chosen or the court told you what direction to take by Friday of this week and the qualifying deadline was on or about the 12th, August 12th. You have 35 days. Do you have any comments to the court about the election process, including the voters and your experience, your 25 years of experience?

A. Well, like I said, in three weeks, I can have everybody in my precincts; and shortly after [p. 21] that time, I could do my ballots. I could be ready in Lamar County.

Q. How do you notify folks of the change?

A. By mail. We fill out a voter registration card and mail it to them.

Q. Is that the common practice as you know it across the state?

A. Yes, sir. I think most everybody does it that way.

Q. If you have changes, you include supervisor districts and justice court districts and legislative changes?

A. Every time we change a voter, we notify them as to their new precinct and voting place.

MR. MOORE: Judge, I believe as far as the circuit clerk is concerned, I covered the areas that you were interested in. If you have some other areas –

JUDGE BARKSDALE: Yes, sir. I just wanted to ask you: You stated it will take you three weeks to get your precincts ready?

THE WITNESS: Yes, sir.

JUDGE BARKSDALE: How many more weeks to complete the other tasks that you have to do as far as your ballots et cetera?

[p. 22] THE WITNESS: If we use paper ballots, I could do it in another week. This is after we get the qualifying back from the state parties. We wouldn't have that. If your deadline – I don't know how long it will take the state parties, but from the time we get everything from the state parties, in a week I could have the regular paper ballot and probably it's going to take the full 16 days if we go with the machine.

MR. MOORE: If I can, your Honor –

BY MR. MOORE:

Q. Mr. Parker, if we were in a time crunch, which we are, and you run all the other elected offices on your computer, is it possible for you to run the legislative elections on paper ballots and have a much smaller time frame to work in?

A. Sure, if the court would allow that, we could.

Q. Do you think that would hold true not only in your county but throughout the state?

A. Again, you know, it's going to take extra help probably. You know, I believe we could. Circuit clerks and election commissioners are going to do their job. If

we get a plan we're going to get it done. We'll work around the [p. 23] clock. We'll get it done.

Q. If the court says you are having elections on September 17th, do you feel confident they will be held and held properly?

A. They will in Lamar County, and I believe in every other county.

JUDGE PICKERING: If we go beyond Friday getting you the districts, if we go beyond the 12th for the qualification deadline, will that make it any more difficult for you?

THE WITNESS: The longer it is, the more difficult it will be. But if we have just got any reasonable time, we can get it done with the help that we're going to have to have.

BY MR. MOORE:

Q. Would you rather have elections this year –

A. Yes, sir.

Q. – than elections again next year or would you rather have elections this year and that be for four years?

A. This year for ten more.

Q. I might ask – to me it's a serious question. I might ask you, Mr. Parker, what problems are there for the taxpayers of this state if elections were held under a plan this year and [p. 24] then elections were held again next year for legislative offices?

A. In Lamar County, it costs us approximately $20,000 a day to hold a county-wide election. So every election we have that is unnecessary, that's what it costs.

Q. That's pretty significant change.

A. Hinds County, ain't no telling what it costs to hold a county-wide election.

JUDGE BARKSDALE: Mr. Parker, if you got your plan on Friday, day after tomorrow, or knew the plan, and if the qualifying deadline were on or about Monday, August 12th, 35 days before the election, would that give you enough time to have the election held with your normal voting machines, et cetera, rather than paper ballots?

THE WITNESS: Other than absentee ballots. I could – and what we could do. This is another thing we would need help from the court on is we could use the paper ballot for absentees and then we have a resolution board on the optical scan that we use, and they could transfer them to a counting ballot and have it all counted on the same program. We could do it.

The plan is what we need. If we had that [p. 25] Friday, we could go to work and get our people transferred while we're waiting on the deadline for qualifying. The deadline is not the problem. It's the plan. Transferring voters is our big problem. We know how to handle elections and do the ballot faces and all of that. Getting the people transferred is our biggest problem.

JUDGE BARKSDALE: What is the problem with absentee ballots? Assuming we have the qualifying deadline on the 12th, what do you need changed in the law so you can have the absentee ballots?

THE WITNESS: The absentee ballots, they have to go to Omaha. We have to get all of that done and send it to Omaha for a board to be programmed, and they do something similar on the punch card systems. We could go ahead and do our ballot faces and have absentees ready as quick as we get our deadline candidates. If we have to wait and send it all through Omaha we're talking about this 16-day period here. If we could do paper ballot – absentees on the paper ballots, we could have them within two or three days after we get the legislative candidates.

MR. MOORE: We would relax the law, your [p. 26] Honor, that requires that the absentee ballot be in the same form as the other ballots.

JUDGE PICKERING: They don't have to be in the order?

THE WITNESS: The form and size is what it says. The form and size has to be the same as the official ballot.

JUDGE BARKSDALE: How long do you think would you need for the absentee ballot? You say it's 45 days now. How long would you need?

THE WITNESS: I could have them ready in my county to go out in three days. We would just send them out. One thing that might help, if another thing – see, now you have to get them in at 12:00 the day before the

election. If we would let absentee ballots come on through election day and let the executive committees count them the next day, it would help voters get in some ballots by them being late going out.

BY MR. MOORE:

Q. There was one problem, Mr. Parker, I might remind you about the application and the voted ballot coming in at the same time. I'm not sure there's anything the court might could do.

A. We do get a lot of ballots back in. Of [p. 27] course, this is true in all elections. If it's local people, ballots and application are in the same envelope. We send out separate envelopes and have them clearly marked.

JUDGE PICKERING: Mr. Moore, that's clearly a legislative clearly problem. We're not concerned with this beyond – we don't want to get into any more kegs of worms.

MR. MOORE: It's one they brought up.

JUDGE PICKERING: It's not one for this court.

MR. MOORE: Your Honor, I don't have any further questions of Mr. Parker along these lines.

JUDGE BARKSDALE: All right. Any questions from any of the other parties?

BY MR. COLOM: I'll be very brief, your Honor.

CROSS-EXAMINATION

BY MR. COLOM:

Q. In the area of absentee ballots, you're going to have a very short time. Is that correct?

A. Correct.

Q. That's your main problem, and the form.

A. Well, in ballots that's our problem. We [p. 28] just simply don't have time to get them ready, you know.

Q. The second thing that delays the absentee ballots is, one, the person has to request the application.

A. Right.

Q. It would make it more efficient if you could mail out the application and the ballot at the same time. Isn't that true?

A. Yes, it would.

Q. If you were permitted to do that in this election.

A. If we were permitted to do that. Under the law now, we can't. But it would save time, yes, sir.

Q. Because under the present system, they have to mail in an application. Then you get the application, and then you mail them a ballot and then they mail you a ballot back. That's four times in the mail.

A. That's correct.

Q. Is that correct?

A. That's correct. Yes, sir.

Q. So if the court would relax the requirement that allows you to mail in the – mail the [p. 29] application and the ballot together, that would speed it up?

A. Yes, sir, it would. It would save, you know, mailing time several days. And for overseas people, it would mean whether or not their ballot got back there.

Q. And if it would relax the requirement of the mailing back the application and ballot in the same envelope, that would mean fewer ballots would be thrown out?

A. Yes, sir.

Q. When you mail the application and the ballot together, there's a tendency for them to send the application and ballot back together.

A. We got a lot of them that way and they are never opened.

Q. You think both of those requirements need to be relaxed for this election in this short term.

A. It would help the voter's vote be counted.

Q. Now, currently under presidential and federal elections, you take ballots through the end of the day election day. Is that correct?

A. Yes, sir.

Q. It would, in effect, give us an extra day if this court would apply the federal standards to [p. 30] this election.

A. Yes, sir.

Q. You are comfortable doing that?

A. Yes, sir. Another thing, we got a cut off day on the Saturday before. For this short period of time, with the voter confusion, not knowing what precinct they are in, we might even accept voting in the office through Monday.

Q. Monday at noon. That would be help? Would that create any problems for you?

A. Create a problem, but we're willing to do it. It's work. We know we are all on a tight schedule and short of time. Anything to help the voters vote, we're willing to do it.

Q. I guess the other problem we are concerned about is that when people will go to a precinct – I guess it's one of three things can happen. They can be at the wrong box. They could be unregistered or for some technical reason they weren't properly transferred. So they show up and they can't vote.

A. Yes, sir. This year with the short time, with us just getting our redistricting plan and waiting on this one, we are going to have people that we're probably not going to have in the right [p. 31] precincts. I am presently – we have a lot of people have a post office box. We don't know where they live. We are doing a mailout to them attempting to get their address, get them in the right place.

* * *

[p. 61] * * *

HENRY KIRKSEY,
having been duly sworn, testified as follows:

DIRECT EXAMINATION

BY MS. McDONALD:

[p. 67] Q. Would you just start with the income information, please, the U.S. Census per capita for the entire U.S. and then the one that's for Mississippi, the second one, I believe.

A. As you will see on the exhibit, this is for the data developed by the census -- Bureau of the Census of the United States, and it concerns the years 1970, 1980 and an interim report for 1985. The purpose of this particular exhibit is to compare it with the other district which deals with just Mississippi, and I wanted to determine for myself from the census data whether or not there is a similarity between the disparity or gap between black/white education and income in Mississippi and that throughout the United States of America.

And when you look at the data, it's no point in going to the specifics here except to say that the dotted line – in the 1970 example, the dotted [p. 68] line from black to white in the 1980 and the same in the 1985 shows a gap naturally that is between the level or the per capita income of blacks and other races, particularly principally white, while it's listed as white but it's really a combination of other races under white. So that disparity as we go from 1970 to 1985 not only does not diminish, but it grows; and that's the important point in making this kind

of an example of what is happening to blacks in this country and particularly in this state.

Now, if I go then – if I go then from the national to the state where I have just a world of information and I keep it current, as I receive information from all segments from the State Department of Education, the state – all elements of the state government, then I can take the population for 1970 and show you with the little divided line just listed under state – you see the level of income for the state of 19 — for 1970. The next column is the white income, per capita income, for the state.

To begin it in 1970, let me say that the state level of per capita income was 1,935. For the white population or the white per capita [p. 69] income, that's the whole population, it was 2,545. And for blacks it was just 898. With that low population, you would expect that the – with civil rights enacted, you are going to see a decline in that gap.

When you go to 1980, you see that the gap is still there. In fact, the gap has increased. The state income for 1980 per capita income was $5,183 and for the whites was 6,484, and for blacks it was down 2,833. That's a big gap there.

Now, then I go to the interim report that I received from the Census Bureau, and I find that in the interim – and I might have to point out because you will find when they put out the interim report, seldom is there a racial breakdown. So I'm not sure, since this was done several years ago, that there was a racial breakdown for 1985. But the projection was there – was made possible by the fact that they gave a total, the income per capita income for

blacks and the per capita income for whites. So I would work the table out on my own to show the gap, and that was the main purpose for development of this chart for the state of Mississippi.

Now, I want to point out one other thing, if [p. 70] I may, in that connection. And I think this will save time. Because my view is that that per capita income difference is predicated primarily on the difference in the level of education of blacks and whites in this state, and one of the factors involved in that is whether or not we are adequate – the state is adequately providing for education on an equal basis for blacks and whites. And I think that the other chart that you have there, which is titled, "Mississippi Public School Systems State Department of Education STE Report 1986-87" shows the hiring of teachers for the system. I have to point out first and foremost that the public school enrollment in the state of Mississippi is majority black.

* * *

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI
JACKSON DIVISION

HOLLIS WATKINS, ALICE HARDEN, AARON HENRY, EDWARD BLACKMON, JR., SAMUEL McCRAY, JACQUELINE HARPER, BEN F. BURKETT, MAC ARTHUR COTTON, and JOHN QUINCY ADAMS, on behalf of themselves and all others similarly situated,

PLAINTIFFS

VERSUS

CIVIL ACTION NO. J91-0364(L)
FILED AUG 06 1991

RAY MABUS, GOVERNOR OF THE STATE OF MISSISSIPPI, MIKE MOORE, ATTORNEY GENERAL OF THE STATE OF MISSISSIPPI, and DICK MOLPUS, SECRETARY OF STATE OF THE STATE OF MISSISSIPPI, members of the STATE BOARD OF ELECTION COMMISSIONERS, MISSISSIPPI DEMOCRATIC PARTY EXECUTIVE COMMITTEE, and MISSISSIPPI REPUBLICAN PARTY EXECUTIVE COMMITTEE,

DEFENDANTS

THE STANDING JOINT LEGISLATIVE COMMITTEE ON REAPPORTIONMENT OF THE MISSISSIPPI LEGISLATURE; TIM FOR, in his official capacity as Speaker of the House of Representatives; GLENN S. DeWEESE, in his official capacity as President Pro Tempore of the Mississippi Senate; and THE STANDING COMMITTEE OF APPORTIONMENT AND ELECTIONS OF THE MISSISSIPPI HOUSE OF REPRESENTATIVES,

INTERVENOR DEFENDANTS

NOTICE OF APPEAL

PLAINTIFFS, HOLLIS WATKINS, ALICE HARDEN, AARON HENRY, EDWARD BLACKMON, JR., SAMUEL McCRAY, JACQUELINE HARPER, BEN F. BURKETT, MAC ARTHUR COTTON, and JOHN QUINCY ADAMS, pursuant to 28 U.S.C. Secs. 1253 and 2284, hereby file their Notice of Appeal and take an Interlocutory Appeal from the ORDER CONCERNING 1991 ELECTION FOR MISSISSIPPI LEGISLATURE entered by a three-judge District Court for the Southern District of Mississippi on August 2, 1991, to the United States Supreme Court.

Dated this Sixth day of August, 1991.

Respectfully submitted,
For the Plaintiffs,

/s/ Carroll Rhodes
Carroll Rhodes, Esq.

P.O. BOX 588
HAZLEHURST, MS 39083
601-894-4323

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI
JACKSON DIVISION

HOLLIS WATKINS, ALICE HARDEN, AARON HENRY, EDWARD BLACKMON, JR., SAMUEL McCRAY, JACQUELINE HARPER, BEN F. BURKETT, MAC ARTHUR COTTON, and JOHN QUINCY ADAMS, on behalf of themselves and all others similarly situated

PLAINTIFFS

VS.

CIVIL ACTION NO. J91-0364(L)
FILED SEP 09 1991

RAY MABUS, GOVERNOR OF THE STATE OF MISSISSIPPI, MIKE MOORE, ATTORNEY GENERAL OF THE STATE OF MISSISSIPPI, and DICK MOLPUS, SECRETARY OF STATE OF THE STATE OF MISSISSIPPI, members of the STATE BOARD OF ELECTION COMMISSIONERS, MISSISSIPPI DEMOCRATIC PARTY EXECUTIVE COMMITTEE, and MISSISSIPPI REPUBLICAN PARTY EXECUTIVE COMMITTEE

DEFENDANTS

THE STANDING JOINT LEGISLATIVE COMMITTEE ON REAPPORTIONMENT OF THE MISSISSIPPI LEGISLATURE: TIM FORD, in his official capacity as Speaker of the House of Representatives; GLENN S. DEWEESE, in his official capacity as President Pro Tempore of the Mississippi Senate; and THE STANDING COMMITTEE OF APPORTIONMENT AND ELECTIONS OF THE MISSISSIPPI HOUSE OF REPRESENTATIVES

INTERVENOR-DEFENDANTS

PLAINTIFFS' AMENDED NOTICE OF APPEAL

PLAINTIFFS, HOLLIS WATKINS, ALICE HARDEN, AARON HENRY, EDWARD BLACKMON, JR., SAMUEL McCRAY, JACQUELINE HARPER, BEN F. BURKETT, MAC ARTHUR COTTON, and JOHN QUINCY ADAMS, pursuant to 28 U.S.C. §§ 1253 and 2284 and 42 U.S.C. § 1973C, hereby file their Amended Notice of Appeal and take an interlocutory appeal to the United States Supreme Court from: (1) the ORDER CONCERNING 1991 ELECTIONS FOR MISSISSIPPI LEGISLATURE entered by a three-judge District Court for the Southern District of Mississippi on August 2, 1991; (2) the Memorandum Opinion and Order entered by a three-judge District Court for the Southern District of Mississippi on August 9, 1991; and (3) the ORDER entered by a three-judge District Court for the Southern District of Mississippi on August 30, 1991.

This the 9th day of September, 1991.

Respectfully submitted,
For the Plaintiffs,

/s/ Carroll Rhodes
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CERTIFICATE OF SERVICE

I, CARROLL RHODES, one of the attorneys for the plaintiffs, hereby certify that I have this day mailed, by the United States Mail, a true and correct copy of the above and foregoing Amended Notice of Appeal to the following:

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This the 9th day of September, 1991.

/s/ Carroll Rhodes
Carroll Rhodes

PLAINTIFF'S EXHIBIT P-10

JOINT COMMITTEE
INSTRUCTIONS AND CRITERIA

(as adopted by the Joint Committee
at its January 30, 1991 meeting)

Background

The 1990 federal decennial census was conducted on April 1, 1990. The state population totals from the 1990 census were released by the U.S. Bureau of the Census on December 26, 1990 prior to the December 31, 1990, deadline, *see* 13 U.S.C. § 141(b). By statute, 13 U.S.C. § 141(b), the Bureau of the Census is to release the substate population totals on or before April 1, 1991. These substate totals include the data required by P.L. 94-171. The Bureau of the Census has most recently estimated that the P.L. 94-171 data for the State of Mississippi will be shipped to the state sometime the second or third weeks of February, 1991. The P.L. 94-171 data for the State of Vermont was delivered on January 15, 1991.

Instructions and Criteria

Therefore, in order to discharge its responsibilities imposed by state law and the responsibilities imposed on the Legislature under federal and state law, the Joint Committee directs as follows:

1. That upon receipt of the P.L. 94-171 data for the State of Mississippi MARIS shall immediately prepare tables which report the population, deviation, percent deviation, population by race and racial percentages, and voting age population by race and racial percentages for

the currently existing Mississippi Senate and House Districts as contained in the currently effective apportionments of the House and Senate, Miss. Code Ann. §§ 5-1-1 & -3 (Supp. 1990), the deliver such data to the Joint Committee, its staff counsel, and its special counsel *as soon as possible*. Additionally, MARIS should promptly transpose the P.L. 94-171 data on the precinct lines as they existed in Mississippi on October 1, 1990, and, report such data by such precincts to the Joint Committee.

2. That in the event that the range of maximum relative deviations from the ideal exceeds 10% in either or both the current House and Senate plans, then the Joint Committee will proceed to draft proposed plans for the House and/or Senate which comply with the following criteria:

a. The Districts Should be Substantially Equal In Population. Specifically, The Overall Range Of Maximum Relative Deviations From The Norm Among The Districts Should Be Less Than 10%.

b. The Plan Should Not Dilute Minority Voting Strength.

The Plan should comply with the requirements of Section 5 of The Voting Rights Of 1965, As Amended, 42 U.S.C. § 1973c, Section 2 of the Voting Rights of Act of 1965, as amended, 42 U.S.C. § 1973, and the 14th and 15th Amendments to the United States Constitution.

It should not be adopted for a racially discriminatory purpose and should not have a racially discriminatory

effect. It should not constitute a retrogression in the existing minority strength. It should provide an equal opportunity for minority voters to participate in the political process and elect representatives of their choice.

c. The Plan Should Avoid A Political Gerrymander.

d. The Territory Of Each District Should Be Contiguous.

e. The Districts Should Be Compact to the extent possible consistent with constitutional and legal standards

f. Consistent with other constitutional and legal requirements, the District Boundaries Should Cross Governmental Or Political Boundaries The Least Number Of Times Possible.

g. To The Extent Possible and within the constitutional and legal standards, the Districts Should Be Structured Along County Lines, And, If County Lines Are Fractured, the Election District Lines Should be Followed As Nearly as Possible.

h. Consistent With Other Legal Requirements, The Districts should be drawn In Such A way That avoids or Minimizes The Number Of Contests Between Present Incumbents And Preserves The Cross Of The Present Districts.

Upon completion of any such draft plan or plans, the Joint Committee will publicize the draft plan or plans and conduct hearings to solicit public input before acting on the draft plan or plans and any revisions thereto.

3. That, in the event that the range of maximum relative deviations from the ideal does *not* exceed 10% in either or both the current House and Senate plans, then MARIS shall immediately report that fact to the Joint Committee.

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI
JACKSON DIVISION

HOLLIS WATKINS, ET. AL. PLAINTIFFS

VS. CIVIL ACTION NUMBER J91-0364(L)
FILED JUL 03 1991

RAY MABUS, GOVERNOR OF THE STATE OF MISSISSIPPI, ET. AL. DEFENDANTS

MOTION FOR A TEMPORARY RESTRAINING ORDER AND/OR A PRELIMINARY AND/OR A PERMANENT INJUNCTION

Plaintiffs, Hollis Watkins, Alice Harden, Aaron Henry, Edward Blackmon, Jr., Samuel McCray, Jacqueline Harper, Ben F. Burkett, Mac Arthur Cotton, and John Quincy Adams, on behalf of themselves and all others simmilary situated, pursuant to 28 U.S.C. § 2284; 42 U.S.C. § 1973c; *Perkins v. Matthews*, 400 U.S. 379, 383-86 (1971); *Allen v. Board of Elections*, 393 U.S. 544, 565-66 (1969); *Connor v. Waller*, 421 U.S. 656 (1975); *City of Lockhart v. United States*, 460 U.S. 125; *Clark v. Roemer*, 59 U.S.L.W. 4583 (decided June 3, 1991); *Reynolds v. Sims*, 377 U.S. 533 (1964); *Kilgarlin v. Hill*, 386 U.S. 120 (1967); *Brown v. Thomas*, 462 U.S. 835, 842 (1983); *Mahan v. Howell*, 410 U.S. 315 (1973); *Chapman v. Meier*, 420 U.S. 1 (1975); *Board of Estimates v. Morris*, 489 U.S. 688 (1989); and 28 C.F.R. § 51.13(d) and (e) move this Honorable Court to grant plaintiffs a temporary restraining order and/or a preliminary and/or permanent injunction enjoining and restraining the defendants, their officers, agents, employees, attorneys, successors in office, and all persons in active concert and participation with them, from conducting or

scheduling any primary, special, or general elections for the Mississippi State Senate or the Mississippi House of Representatives. The grounds for this motion are:

(1) The defendants have enacted the following voting changes without obtaining administrative or judicial preclearance:

(a) A reapportionment statute for the Mississippi State Senate, and

(b) A reapportionment statute for the Mississippi House of Representatives.

(2) The above mentioned voting changes have not been precleared. The United States Attorney General, through his designee, entered a timely objection to the voting changes on July 2, 1991.

(3) Injunctive relief is appropriate for the § 5 violations.

(4) The population in the districts described in the existing apportionment statute for the Mississippi State Senate is unconstitutionally malapportioned; and

(5) The population in the districts described in the existing apportionment statute for the Mississippi House of Representatives is unconstitutionally malapportioned.

Injunctive relief is appropriate where unprecleared voting changes have been enacted. *Clark v. Roemer*, supra. And, although § 5 coverage issues are to be decided by a three-judge district court, *Allen*, supra at 563, a single district judge may issue a temporary restraining order enjoining the implementation of a covered voting change

until a three-judge court can be constituted. *Perkins v. Matthews*, supra at 383-86; 28 U.S.C. § 2284.

Injunctive relief is also appropriate when election districts are unconstitutionally malapportioned. *White v. Regester*, 412 U.S. 755 (1973); *Connor v. Waller*, supra.

In support of this motion, plaintiffs present the Declarations of Carroll Rhodes, John Quincy Adams, Jacqueline Harper and Henry Kirksey, with exhibits attached.

This motion relates to an urgent and necessitous matter inasmuch as a qualification deadline for all party and independent candidates for Mississippi State Senate and Mississippi House of Representatives. Therefore, plaintiffs request that this matter be set down for an expeditious hearing on or before July 2, 1992.

As to this motion, it is without a doubt that: (1) plaintiffs have a substantial likelihood of success on the merits, (2) a substantial threat exists that plaintiffs will suffer irreparable injury if an injunction does not issue, (3) the threatened injury to plaintiffs outweigh any threatened harm the injunction will cause the defendants, (4) granting the injunction will not disserve the public interest, and (5) plaintiffs have no plain, speedy, or adequate remedy at law. *Commonwealth Life Ins. Co. v. Neal*, 669 F. 2d 300 (5th Cir. 1982); *Cook v. Lucket*, 575 F. Supp. 479 (S.D. Miss. 1983); *Canal Authority v. Callaway*, 489 F. 2d 567 (5th Cir. 1974).

WHEREFORE, plaintiffs request that this Court set this matter down for an expeditious hearing, and upon such hearing:

(a) Grant plaintiff a temporary restraining order and/or a preliminary and/or permanent injunction enjoining, restraining, and prohibiting the defendants' their officers, agents, employees, attorneys, successors in office, and all persons in active concert and participation with them, from conducting any primary or general elections for the Mississippi State Senate and Mississippi House of Representatives. A temporary restraining order may be entered by a single district judge until a three-judge court is convened. *Perkins v. Matthews*, supra at 383-86.

(b) Grant plaintiffs any other relief the Court deems appropriate.

Respectfully submitted,
Hollis Watkins, et al.,
on behalf of themselves and
and others similarly situated
BY: /s/ Carroll Rhodes
Carroll Rhodes

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI
JACKSON DIVISION

HOLLIS WATKINS, ET AL.
Individually and on behalf of
All Others Similarly Situated PLAINTIFFS

vs. CIVIL ACTION NO. J91-0364(L)
(Filed Jul. 29, 1991)

RAY MABUS, Governor of Mississippi, ET AL.

THE STANDING JOINT LEGISLATIVE
COMMITTEE ON REAPPORTIONMENT
OF THE MISSISSIPPI LEGISLATURE;
TIM FORD, In His Official Capacity
As Speaker of the Mississippi House of
Representatives; and GLEN S. DEWEESE,
In His Official Capacity As President
Pro Tempore of The Mississippi
Senate DEFENDANTS-INTERVENORS

MOTION FOR PRELIMINARY INJUNCTION

Comes now plaintiffs, on behalf of themselves and those similarly situated and through their counsel of record and file their Motion for Preliminary Injunction pursuant to Rule 65 of the Federal Rules of Civil Procedure, 42 U.S.C. Section 1973 (c), [sic] 28 U.S.C. Section 2284, *Thornburg v. Gingles*, 478 U.S. 390, 92 L.Ed 25, 106 S.Ct. 2742 (1986), and move this Honorable Court to grant plaintiffs a preliminary injunction enjoining the use of the 1982 Reapportionment Plan on the following grounds:

I.

1. That the 1982 plan for the Mississippi House and Senate dilutes black voting strength in violation of Section 2 of the 1965 Voting Rights Act.

2. That the 1982 House and Senate Plans are constitutionally infirm as they are malapportioned.

Injunctive relief is appropriate where a voting scheme dilutes black voting strength and is malapportioned.

II.

As to this motion, it is without a doubt that: (1) plaintiffs have a substantial likelihood of success on the merits, (2) a substantial threat exists that plaintiffs will suffer irreparable injury if an injunction does not issue, (3) the threatened injury to plaintiffs outweigh any threatened harm the injunction will cause the defendants, (4) granting the injunction will not disserve the public interest and (5) plaintiffs have no plain, speed, or adequate remedy at law. *Commonwealth Life Ins. Co. v. Neal*, 669 F.2d 300 (5th Cir. 1982); *Cook v. Lucket*, 575 F.Supp. 479 (S.D. Miss. 1983); *Canal Authority v. Callaway*, 498 F.2d 567 (5th Cir. 1974).

WHEREFORE, plaintiffs request relief.

Respectfully submitted,

HOLLIS WATKINS, ET AL.,
Individually and on behalf
of all other similarly situated

/s/ Deborah A. McDonald
DEBORAH A. McDONALD
POST OFFICE BOX 211
FAYETTE, MS 39069
601-786-8730

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI
JACKSON DIVISION

HOLLIS WATKINS, ET AL. **PLAINTIFFS**

vs. **CIVIL ACTION NO. J91-0364(L)**
(Filed Aug. 26, 1991)

RAY MABUS, GOVERNOR OF THE STATE OF MISSISSIPPI, ET AL. **DEFENDANTS**

MOTION FOR PRELIMINARY INJUNCTION UNDER § 5

Plaintiffs, pursuant to 42 U.S.C. § 1973c, hereby move this Honorable Court to enjoin the enforcement of its August 2, 1991 Order respecting legislative elections, and any amendments to that order which encompass changes in voting, on the grounds that the August 2, 1991 Order contains changes in voting that were created and drafted by the Democratic Party and Republican Party of the State of Mississippi and those changes have not yet been precleared pursuant to § 5 of the voting Rights Act of 1965.

This the 26th day of August, 1991.

Respectfully submitted,
HOLLIS WATKINS, ET AL.,
on behalf of themselves and
all others similarly situated,
PLAINTIFFS

BY: /s/ Carroll Rhodes

[SEAL]

U.S. Department of Justice
Civil Rights Division

Office of the
Assistant Attorney General

Washington, D.C. 20530

JUL 2 1991

Honorable Hainon A. Miller
Chair, Mississippi Senate
Elections Committee
P. O. Box 1018
Jackson, Mississippi 39215-1018

Dear Senator Miller:

This refers to the proposed redistricting of the Mississippi Senate and the Mississippi House of Representatives, submitted to the Attorney General pursuant to Section 5 of the Voting Rights Act of 1965, as amended, 42 U.S.C. 1973c. We received the information necessary to complete your submission on June 24, 1991. In accordance with your request, we have expedited our review of this submission.

We have given careful consideration to the materials you have presented, as well as to information and comments provided by other interested parties. We note at the outset that the proposed districting plans for both the House and the Senate appear to have no retrogressive effect within the meaning of Section 5. Both plans maintain or expand the number of districts in which minority voters usually will be able to elect legislators of their choice, including, for example, House District 76. However, retrogressive effect is only one aspect of our inquiry

under Section 5. See *Busbee v. Smith*, 549 F. Supp. 494, 516 (D.D.C. 1982). As set forth in our published guidelines, we are also obligated to evaluate whether the submitting authority has carried its burden of establishing that its proposed districting plans are free of racially discriminatory purpose, or whether the plan would cause a clear violation of Section 2 of the Act. See 28 C.F.R. 51.55(b)(2).

During the deliberations leading to the adoption of the submitted plans, the Legislature established that currently black citizens do not have an equal opportunity to elect candidates of their choice to either the Mississippi House or Senate. Information provided to the Legislature in the public hearings, in its consideration of alternative districting plans, in written comments and oral presentations, and through the advice of counsel, clearly established that reasonably compact and contiguous districts could be drawn in a number of additional areas of the state in which black voters usually would be able to elect representatives of their choice. It also became clear that in certain areas of the state, notably the Delta, the lingering effects of the state's long history of official discrimination have left a situation where black voters face unique obstacles to effective access to the franchise.

In the Delta, our review has focused on several expressed concerns about the proposed plans for both the House and Senate: (1) certain districts tend to submerge the more active black urban populations into areas where past election results show that despite apparent majorities black voters will not be likely to elect candidates of their choice (House Districts 28, 31, 34 and 56); (2) in other districts urban black concentrations are diverted away to non-Delta districts (Senate Districts 14 and 23);

and, (3) districts in which white concentrations unnecessarily are included within such districts (House Districts 29, 50 and 51). We also note that the apparent black majorities in certain Delta districts (House Districts 30 and 33, Senate District 13) are inflated by predominantly black institutional populations whose participation in elections is limited, so that the resulting districts fail to provide black voters an equal opportunity to elect legislators of their choice. We have carefully evaluated the information and explanations you have provided as to these districts, but remain unpersuaded that their configuration was based on legitimate non-racial reapportionment criteria. Under these circumstances, it would appear that the proposed plan is calculated not to provide black voters in the Delta with the equal opportunity for representation required by the Voting Rights Act.

In other areas, we note the diversion in the Senate plan of rural Holmes County from its present and more logical alignment with the Delta, with a consequent dilution of minority voting strength there (Senate District 24). While the combination of Holmes with parts of urban Hinds County does create a new predominantly black Senate district, a like positive result could have been achieved by linking predominantly black areas of Hinds with similarly areas of nearby Canton, which under your plan is submerged in a predominantly white district. Such a configuration would appear better to serve the Legislature's stated redistricting criteria.

Also, a number of additional black concentrations seem to be fragmented unnecessarily, with black voting strength being submerged in predominantly white districts. Such is the case in the Senate redistricting for the

southwestern (districts 37 and 38) and eastern (districts 6-8, 16 and 17) portions of the state, and in east Mississippi (districts 16, 17, 21 and 22), Pike County, and Hinds County in the House plan. Alternative plans provided for effective black majority districts in these areas.

Finally, we note that the proposed plan unnecessarily reduces minority voting strength in House District 119 as well as in Senate District 28, another district which includes a large predominantly black institutional population.

Viewing the situation as a whole, then, it would appear that the Legislature avoided the creation of a significant number of compact districts in which black citizens could elect candidates of their choice. Nor can we ignore the substantial indications in the materials and information available to us that this result was recognized during deliberations and that support for the submitted plans and opposition to alternative suggestions were sometimes characterized by overt racial appeals.

Under these circumstances, we cannot conclude, as we must under the Act, that the State has sustained its burden of showing that the proposed House and Senate redistricting plans are free of any racially discriminatory purpose. Accordingly, I must, on behalf of the Attorney General, interpose an objection to the proposed redistricting plans for the Mississippi House of Representatives and the Mississippi Senate.

Of course, as provided by Section 5 of the Voting Rights Act, you have the right to seek a declaratory judgment from the United States District Court for the District of Columbia that these changes have neither the

purpose nor will have the effect of denying or abridging the right to vote on account of race or color. In addition, Section 51.45 of the guidelines permits you to request that the Attorney General reconsider the objection. However, until the objection is withdrawn or a judgment from the District of Columbia Court is obtained, the submitted changes continue to be legally unenforceable. 28 C.F.R. 51.10.

We are mindful that the regularly scheduled elections for the Mississippi House and Senate are fast approaching. We understand that for elections to go forward under a plan which satisfies both the legitimate concerns of the Mississippi Legislature and the requirements of federal law will require a concerted effort. Please be assured that this Department stands ready to cooperate in every way, including providing review under section 5 on an exceptionally expedited basis so that the scheduled elections might be held with a legally enforceable plan under the existing schedule. In that regard, and so that we will be able to fulfill our obligations to enforce the Voting Rights Act, please inform us promptly what steps Mississippi intends to take with regard to redistricting. If you have any questions, feel free to call Voting Section attorney John Tanner (202-307-2897), who has been assigned to handle this matter.

Sincerely,
/s/ John R. Dunne
John R. Dunne
Assistant Attorney General
Civil Rights Division

28 U.S.C. § 2284. Three-judge court; when required; composition; procedure

(a) A district court of three judges shall be convened when otherwise required by Act of Congress, or when an action is filed challenging the constitutionality of the apportionment of congressional districts or the apportionment of any statewide legislative body.

(b) In any action required to be heard and determined by a district court of three judges under subsection (a) of this section, the composition and procedure of the court shall be as follows:

(1) Upon the filing of a request for three judges, the judge to whom the request is presented shall, unless he determines that three judges are not required, immediately notify the chief judge of the circuit, who shall designate two other judges, at least one of whom shall be a circuit judge. The judges so designated, and the judge to whom the request was presented, shall serve as members of the court to hear and determine the action or proceeding.

(2) If the action is against a State, or officer or agency thereof, at least five days' notice of hearing of the action shall be given by registered or certified mail to the Governor and attorney general of the State.

(3) A single judge may conduct all proceedings except the trial, and enter all orders permitted by the rules of civil procedure except as provided in this subsection. He may grant a temporary restraining order on a specific finding, based on evidence submitted, that specified irreparable damage will result if the order is not granted, which order, unless previously revoked

by the district judge, shall remain in force only until the hearing and determination by the district court of three judges of an application for a preliminary injunction. A single judge shall not appoint a master, or order a reference, or hear and determine any application for a preliminary or permanent injunction or motion to vacate such an injunction, or enter judgment on the merits. Any action of a single judge maybe reviewed by the full court at any time before final judgment.

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42 U.S.C. § 1973. Denial or abridgement of right to vote on account of race or color through voting qualifications or prerequisites; establishment of violation

(a) No voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied by any State or political subdivision in a manner which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color, or in contravention of the guarantees set forth in section 4(f)(2) [42 USCS § 1973(f)(2)], as provided in subsection (b).

(b) A violation of subsection (a) is established if, based on the totality of circumstances, it is shown that the political processes leading to nomination or election in the State or political subdivision are not equally open to participation by members of a class of citizens protected by subsection (a) in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of

their choice. The extent to which members of a protected class have been elected to office in the State or political subdivision is one circumstance which may be considered: Provided, That nothing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion in the population.

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42 U.S.C. § 1973c. Alteration of voting qualifications and procedures; action by State or political subdivision for declaratory judgment of no denial or abridgement of voting rights; three-judge district court; appeal to Supreme Court

Whenever a State or political subdivision with respect to which the prohibitions set forth in section 4(a) [42 USCS § 1973b(a)] based upon determinations made under the first sentence of section 4(b) [42 USCS § 1973b(b)] are in effect shall enact or seek to administer any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1964, or whenever a State or political subdivision with respect to which the prohibitions set forth in section 4(a) [42 USCS § 1973b(a)] based upon determinations made under the second sentence of section 4(b) [42 USCS § 1973b(b)] are in effect shall enact or seek to administer any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1968, or whenever a State or political subdivision with respect to which the prohibitions set forth in

section 4(a) [42 USCS § 1973b(a)] based upon determinations made under the third sentence of section 4(b) [42 USCS § 1973b(b)] are in effect shall enact or seek to administer any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1972, such State or subdivision may institute an action in the United States District Court for the District of Columbia for a declaratory judgment that such qualification prerequisite, standard, practice, or procedure does not have the purpose and will not have the effect of denying or abridging the right to vote on account of race or color, or in contravention of the guarantees set forth in section 4(f)(2) [42 USCS § 1973b(f)(2)], and unless and until the court enters such judgment no person shall be denied the right to vote for failure to comply with such qualification, prerequisite, standard, practice, or procedure: Provided, That such qualification, prerequisite, standard, practice, or procedure may be enforced without such proceeding if the qualification, prerequisite, standard, practice, or procedure has been submitted by the chief legal officer or other appropriate official of such State or subdivision to the Attorney General and the Attorney General has not interposed an objection within sixty days after such submission, or upon good cause shown, to facilitate an expedited approval within sixty days after such submission, the Attorney General has affirmatively indicated that such objection will not be made. Neither an affirmative indication by the Attorney General that no objection will be made, nor the Attorney General's failure to object, nor a declaratory judgment entered under this section shall bar a subsequent action

to enjoin enforcement of such qualification, prerequisite, standard, practice, or procedure. In the event the Attorney General affirmatively indicates that no objection will be made within the sixty-day period following receipt of a submission, the Attorney General may reserve the right to reexamine the submission if additional information comes to his attention during the remainder of the sixty-day period which would otherwise require objection in accordance with this section. Any action under this section shall be heard and determined by a court of three judges in accordance with the provisions of section 2284 of title 28 of the United States Code [28 USCS § 2284] and any appeal shall lie to the Supreme Court.

AMENDMENT 14

Section 1. Citizens of the United States.

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

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(2)

No. 91-434

Supreme Court, U.S.
FILED
OCT 15 1991
OFFICE OF THE CLERK

In The

Supreme Court of the United States

October Term, 1991

HOLLIS WATKINS, ALICE HARDEN, AARON HENRY, EDWARD BLACKMON, JR., SAMUEL McCRAY, JACQUELINE HARPER, BEN F. BURKETT, MAC ARTHUR COTTON, and JOHN QUINCY ADAMS, on behalf of themselves and all others similarly situated,

Appellants

vs.

RAY MABUS, GOVERNOR OF THE STATE OF MISSISSIPPI, MIKE MOORE, ATTORNEY GENERAL OF THE STATE OF MISSISSIPPI, and DICK MOLPUS, SECRETARY OF STATE OF THE STATE OF MISSISSIPPI, members of the State Board of Election Commissioners, MISSISSIPPI DEMOCRATIC PARTY EXECUTIVE COMMITTEE, and REPUBLICAN PARTY EXECUTIVE COMMITTEE,

Appellees,

and THE STANDING JOINT LEGISLATIVE COMMITTEE ON REAPPORTIONMENT OF THE MISSISSIPPI LEGISLATURE, TIM FORD, in his official capacity as Speaker of the House of Representatives; GLENN S. DeWEESE, in his official capacity as President Pro Tempore of the Mississippi Senate; and THE STANDING COMMITTEE OF APPORTIONMENT AND ELECTIONS OF THE MISSISSIPPI HOUSE OF REPRESENTATIVES,

Appellees-Intervenors.

On Appeal From Decisions Of The Three-Judge Court Of the United States District Court For the Southern District Of Mississippi

MOTION TO DISMISS OR AFFIRM

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STATE OF MISSISSIPPI

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COUNSEL FOR MISSISSIPPI REPUBLICAN PARTY EXECUTIVE COMMITTEE

QUESTIONS PRESENTED FOR REVIEW

1. Does this Court lack jurisdiction over this appeal because: (a) the district court's denial of injunctive relief did not rest upon resolution of the merits of appellants' constitutional claim, or (b) the appeal is moot.

2. In the face of imminent elections and in the absence of an enforceable legislative reapportionment plan, may a three-judge district court permit interim legislative elections for a limited term of office to proceed under an existing malapportioned plan?

3. Did the district court abuse its discretion in declining to issue a preliminary injunction under § 2 of the Voting Rights Act because appellants failed to establish the necessary elements for a preliminary injunction, where the court declared that the existing plan would be retained only for a single election for a limited term of office?

4. Was the district court correct in concluding that its order temporarily altering certain provisions of Mississippi election law on an emergency basis did not require preclearance under §5 of the Voting Rights Act because: (a) its factual finding that alterations did not reflect the policy choice of elected officials was not clearly erroneous; (b) equitable principles excused the need for preclearance in the exigent circumstances of this case; or (c) the alterations had no potential for discrimination.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

No. 91-434

HOLLIS WATKINS, ET AL.,

Appellants,

v.

RAY MABUS, GOVERNOR OF THE STATE OF MISSISSIPPI, ET AL.,

Appellees.

On Appeal From Decisions of the Three - Judge Court of the United States District Court for the Southern District of Mississippi

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APPELLEES' MOTION TO DISMISS OR AFFIRM

Pursuant to Rule 18.6, the appellees move to dismiss this appeal or, alternatively, to affirm the judgment of the three-judge district court below. This motion is based on the grounds that (1) this court lacks jurisdiction; (2) the district court, exercising its equitable powers, did not abuse its discretion; (3) the district court's ruling is based on very specific and restricted facts which are unique to this case and which will have no far-reaching implications on Voting Rights Act cases nationwide; and (4) the decision of the district court is eminently correct so as to warrant no further review.

STATEMENT OF THE CASE

A. The Apportionment Plan

In anticipation of the convergence of the 1990 census and the 1991 state and county elections, the Mississippi Legislature, in 1989, changed the state election schedule to permit the legislature and counties to redistrict and obtain approval under Section 5 of the Voting Rights Act so that elections could be held.[1] The new election time frame was established as follows: (A) July 19, 1991: deadline for qualifying for elective office, Miss. Code Ann., § 23-15-359 (Supp. 1990); (B) September 17, 1991: party primary elections, Miss. Code Ann., § 23-15-191 (Supp. !990); and (C) November 5, 1991: general election, Article 4, § 140, Mississippi Constitution of 1890. This new election schedule received § 5 of the Voting Rights Act approval and became effective on June 28, 1989.

The State of Mississippi received the 1990 decennial census data on January 31, 1991, and on April 30, 1991, the Mississippi Legislature adopted reapportionment plans for its House and Senate. On May 10, 1991, the United States Attorney General received, for review under § 5 of the Voting Rights Act, the 1991 legislative reapportionment plan, and on July 2, 1991, the United States Attorney General interposed an objection to the 1991 legislative reapportionment plan.

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[1] The following elective offices are filled every four years and are involved in this year's elections: Governor, Lieutenant Governor, Secretary of State, Attorney General, Auditor of Public Accounts, three public service commissioners, three highway commissioners, Commissioner of Insurance, Commissioner of Agriculture, Senators and members of the House of Representatives, twenty district attorneys, clerks of the circuit and chancery courts of the several counties, as well as sheriffs, coroners, assessors, surveyors, and members of the board of supervisors of the various counties, justice court judges and constables. *See* Miss. Code Ann., § 23-15-193 (Supp. 1990).

On June 28, 1991, the appellants filed a civil action in the district court challenging Mississippi's current legislative apportionment (1982 plan) as well as the 1991 plan. Appellants sought injunctive and other relief under §§ 2 and 5 of the Voting Rights Act of 1965, 42 U.S.C. § 1973 *et seq.*, and the Fourteenth and Fifteenth Amendments to the United States Constitution. The appellants, however, did not serve process on the appellees until July 8, 1991.

After a hearing on July 15, 1991, the three judge district court, *inter alia*: enjoined the July 19, 1991, legislative qualifying deadline; requested recommendations for special master or expert witness; directed parties to file their proposed redistricting plans on or before July 22, 1991, and set the matter for hearing on July 29, 1991.

Only the appellants and the appellees-intervenors (members of two legislative committees) presented the lower court with plans. All plans were examined by the court appointed expert witnesses, who were very critical of all proposed plans, J.S. App. 21-22,[2] and concluded that none of the plans cured the United States Attorney General's §5 objections based on discriminatory purpose, J.S. App. 22.

The district court found serious problems with all of the submitted plans in that: (1) all plans have districts that were not compact, J.S. App. 33;[3] (2) non-compact districts con-

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[2] J.S.___, refers to the Appellants' Jurisdictional Statement and the appropriate page.

[3] The district court described some of the non-compact districts as: "pinwheel", "barbell", "boomerang", "amoeba-like", "half-oval", "narrow alley", "narrow arms shooting out", "bizarrely configured", "octopus like", "oddly-configured", "sickle-shaped", and "dumbbell". J.S. App. 33 n. 11 and n. 12; J.S. App. 34 n. 13.

tained in all of the plans indicated "political, not merely racial, jockeying in configuring these districts," J.S. App. 34; (3) the settlement plan submitted by appellants and the Joint Committee contained changes "for the purpose of defeating a member, or members, of the rival House Committee", J.S. App. 35; (4) the July 11 House Committee plan also contained changes "for pure political reasons", *id.*; (5) appellant/legislator Ed Blackmon testified that power politics was involved in all the plans presented to the Court; that "no clean hands" were involved in the legislatively drawn 1991 plan; and, that compactness had not been honored in drawing the districts, J.S. App. 23-24; (6) "the troubling political winds that have unfailingly roared through this courtroom at every turn of this litigation" . . . are warning lights for any plan" and "sounds an alarm," J.S. App. 29.

The district court concluded:

> The Court is reluctant to adopt, even on an interim basis, any of the plans so filled with little disguised political "landmines". J.S. App. 34.

The district court found that all the plans submitted split a large number of precincts, J.S. App. 23, 35, and that the existing 1982 plan only split 20 precincts for the House and 4 precincts for the Senate, J.S. App. 10.

The district court found that:

> [U]sing the existing law (the 1982 plan) will require splitting fewer precincts than would be required by any of the plans submitted. This Court is wary of the great potential for voter confusion caused by use of any of the submitted plans. J.S. App. 35-36.

Because the district court utilized "the 1982 plan only for interim relief" and "is not adopting, or utilizing, the 1982 plan as a permanent plan", J.S. App. 45-46, the district court found that appellants did not satisfy "the test for preliminary relief" under § 2 of the Voting Rights Act, J.S. App. 46. The district court observed that where corrective relief was available at a later date, the establishment of a Voting Rights Act violation would not merit a preliminary injunction. J.S. App. 46 n.16.

The district court concluded:

> [T]he legislative districts under the 1982 plan are doubtless unconstitutionally malapportioned for a full four year term of office, this court, exercising its equitable powers, holds that under the facts in this case, including the imminent elections, they may be constitutionally utilized for interim relief. J.S. App. 50-51.

The district court acknowledged that it "is not abdicating its responsibility to enforce the provisions of the Voting Rights Act and the constitutional requirements of one-person, one vote," J.S. App. 51, but "conclude[d] that conducting elections under the existing plan is the lesser of the available evils." J.S. App. 51. The three judge court retained jurisdiction; required the parties to submit nominees for a special master by February 14, 1992; and, set a status conference for March 2, 1992, J.S. App. 27.

B. Temporary Changes In State Election Procedures

On July 30, 1991, the district court directed the Mississippi Attorney General to produce a sampling of circuit clerks and election commissioners to provide testimony concerning problems that they could encounter if the Court permitted the 1991 legislative election to proceed.

District court testimony on July 31 illustrated the necessity for altering certain election procedures because of the court's extension of the qualifying deadline for legislative candidates, leaving less than the usual period of time to prepare for the conducting of the September 17 primary. J.S. App. 55.

At a status conference held on July 22, 1991:

> Wilbur Colom, one of the attorneys for the plaintiffs, suggested to the Court that special procedures would be necessary in order to hold elections on September 17, 1991. He further suggested that the Democratic and Republican Party Executive Committees should make a proposal to the Court in that regard. J.S. App. 75.

It was in this light, and only after hearing testimony concerning election procedure difficulties, that the district court requested the parties to make one submission to the trial court concerning "the language" the parties would like to see in the Court's order with respect to modification of election procedures.

Mr. Warren, counsel for appellee Democratic Party,

> asked Mr. Colom, counsel for the plaintiffs, if he would like to make any suggestions on behalf of his clients.
>
> * * *
>
> Mr. Colom did, in fact, provide a handwritten list of proposed election changes to me for inclusion in our submission to the Court. J.S. App. 76.

The appellants' suggestions were reviewed by a staff attorney for the Secretary of State, made available to provide technical assistance on election procedures, who determined that only two (2) of the appellants suggestions could be implemented without "any significant difficulties." J.S. App. 83. These two suggestions of the appellants were incorporated into the document entitled "Proposed Language for Court's Order" which was filed with the lower court on August 1, 1991. The items listed in this proposal reflected the testimony of needed changes due to the capsulated election schedule.

On August 2, the district court entered its order which contained certain temporary alterations in election procedures. These election alterations were only applicable to the September 17 first primary; these alterations were not used in the October 8 second primary, nor will they be used in the November 5 general election or in any future election. J.S. App. 6.

It was not until after this Court denied appellants' application for a stay and injunction, J.S. App. 57, that they sought in the district court a preliminary injunction under §5 invalidating the temporary election procedures contained in the district court's August 2 order. The district court was surprised by the appellants' motion because "the plaintiffs' counsel, Wilbur Colom, was a primary source of the 'changes' which plaintiffs now challenge." J.S. App. 55.

The district court denied appellants' motion stating that its "determination regarding the necessity of changes in certain election procedures . . . was based in large part on the testimony" of witnesses, J.S. App. 55, and because "the parties -- including appellants -- were permitted to make suggestions . . . does not suggest the conclusion that the order reflects 'policy choices of . . . elected representatives.'" *Id.*

The appellants thereafter filed another application for a stay and injunction with this Court which was denied by Justice Scalia on September 16, 1991, Application No. 204.

ARGUMENT

I. THIS COURT SHOULD DISMISS APPELLANTS' APPEAL.

A. Because The District Court's Denial of Injunctive Relief Did Not Rest Upon Resolution Of The Merits Of Appellants' Constitutional Claim, This Court Lacks Jurisdiction To Entertain Their Appeal Under 28 U.S.C. §1253.

In *MTM, Inc., v. Baxley*, 420 U.S. 799 (1975), this Court squarely held:

> [A] direct appeal will lie to this Court under §1253 from the order of a three-judge federal court denying interlocutory or permanent injunctive relief only where such order rests upon resolution of the merits of the constitutional claim presented below.
>
> *Id.*, at 804.

Here, appellants assail the district court's failure to grant them injunctive relief, claiming that "the district court found the designated plans to be unacceptable on the grounds other than constitutional and statutory considerations." J.S. 8. The indisputable truth of this assertion requires the dismissal of appellants' appeal under *MTM*.

MTM, the owner of the Pussycat Adult theatre in Birmingham, had been the target of an action in state court by Alabama officials to enjoin its operations for violations of local obscenity laws. *MTM* retaliated by filing an action to enjoin the enforcement of those statutes, and a three-judge district court was convened under 28 U.S.C. § 2281, since repealed. Act of Aug. 12, 1976, Pub. L. 94-381, §1, 90 Stat. 1119. The district court did not reach the merits of the claim, but dismissed the complaint without prejudice in view of the pending state proceedings, under *Younger v. Harris*, 401 U.S. 37 (1971). *MTM* appealed to this Court under § 1253. 420 U.S. at 799-801.

In holding that § 1253 does not grant jurisdiction over an appeal from the denial of an injunction on grounds other than the merits of the claim, this Court quoted the reasoning of its earlier decision in *Gonzales v. Employees Credit Union*, 419 U.S. 90 (1974):

> ... While issues short of the merits -- such as justiciability, subject-matter jurisdiction, equitable jurisdiction, and abstention -- are often of more than trivial consequence, that alone does not argue for our reviewing them on direct appeal. Discretionary review in any case would remain available, informed by the mediating wisdom of a court of appeals. Furthermore, the courts of appeals might in many instances give more detailed consideration to these issues than this Court, which disposes of most mandatory appeal in summary fashion. 419 U.S., at 99.
>
> 420 U.S. at 803.

This Court reasoned that the lack of mandatory jurisdiction over denials of injunctions in such circumstances was consistent with congressional policy:

> It is certain that the congressional policy behind the three-judge court and direct-review apparatus -- the saving of state and federal statutes from improvident doom at the hands of a single judge -- will not be impaired by a narrow construction of §1253. A broad construction of the statute, on the other hand, would be at odds with the historic congressional policy of minimizing the mandatory docket of this Court in the interest of sound judicial administration.
>
> *Id.*, at 804.

For this reason, the Court concluded that jurisdiction would attach under § 1253 "only where such order [denying injunctive relief] rests upon resolution of the merits of the constitutional claim presented below." *Id.*

Although *MTM* has been criticized by commentators, 17 C. Wright, A. Miller, & E. Cooper, *Federal Practice & Procedure* § 1440 at 152-53 (2d ed. 1988), Congress has not seen fit to amend § 1253. This reluctance can hardly stem from lack of attention to this Court's appellate jurisdiction. As already noted, § 2281 was repealed the year after *MTM* was decided, and 28 U.S.C. § 1252, which permitted direct appeals to this Court from decisions invalidating acts of Congress, was repealed in 1988. Act of June 27, 1988, Pub. L. 100-352, §1, 102 Stat. 662. Through all of this legislative activity, § 1253 has stood precisely as this Court interpreted it in *MTM*.

Invoking this Court's jurisdiction under § 1253, appellants assert, "This is a direct appeal from orders denying preliminary injunctions issued by a three-judge district court for the Southern District of Mississippi on August 2, 1991; August 9, 1991; and August 30, 1991." J.S. 1. Appellants properly characterize their appeal, because the district court's order of August 2 permitted the 1991 elections to proceed under "the

apportionment plan now in effect (1982 plan), Miss. Code Ann., § 5-1-1 (Supp. 1990), *et seq.*" J.S. App. 5.[4] The district court's refusal to disturb Mississippi law did not "rest[] upon resolution of the merits of the constitutional claim," MTM, supra, 420 U.S. at 804; on the contrary, its opinion of August 9 makes plain that "the legislative districts under the 1982 plan are doubtless unconstitutionally malapportioned for a full-four year term of office." J.S. App. 50. Relying upon the equitable discretion recognized by this Court in *Reynolds v. Sims*, 377 U.S. 533, 585 (1964), and *Ely v. Klahr*, 403 U.S. 108, 113 (1971), J.S. App. 39-41, the district court, "exercising its equitable powers," J.S. App. 50, permitted the election to proceed under existing law. Of course, this Court expressly recognized in *MTM* that the exercise of "equitable jurisdiction" is an issue that should be appealed to the court of appeals, 420 U.S. at 803, quoting *Gonzales, supra*, 419 U.S. at 99. Under the plain teaching of *MTM*, then, this Court lacks jurisdiction to entertain appellants' appeal.[5]

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[4] Arguably, pararagraph 5 of the August 2 order, J.S. App. 6-7, grants an injunction, although appellants do not so characterize it, because it alters certain details of Mississippi election law for purposes of the September 17 first primary. Regardless of its proper characterization, appellants' challenge to pararagraph 5 of the order, set forth in Argument III of their Jurisdictional Statement, is moot because the primary is over, as demonstrated hereafter in Part I.B of this Motion.

[5] The only arguable distinction between *MTM* and this case is that the district court's jurisdiction here is based upon 28 U.S.C. §2284(a), requiring a three-judge court "when an action is filed challenging the constitutionality of the apportionment of congressional districts or the apportionment of any statewide legislative body." This provision was adopted by the same Congress which repealed §2281, which provided for a three-judge court to consider any challenge to the constitutionality of a state statute. Act of Aug. 12, 1976, Pub. L. 94-381, §3, 90 Stat. 1119. There is no reason to suppose that Congress intended more liberal appeals from denials of injunctive relief by courts convened under §2284(a) than from their predecessors convened under §2281. On the contrary, it defies a rudimentary

B. Appellants' Appeal Should Be Dismissed As Moot, Because The September 17 First Primary Has Already Been Conducted.

Ordinarily, where, as here, an appellant has mistakenly taken an appeal to this Court under § 1253, this Court vacates the district court's order "so that a fresh order may be entered and a timely appeal prosecuted to the Court of Appeals." *MTM*, *supra*, 420 U.S. at 804 (footnote omitted). In this case, however, any such "fresh order" would be an exercise in futility, as the September 17 first primary has already been conducted. The issues presented by appellants in their appeal are therefore moot, and their appeal should simply be dismissed.

This Court has often been faced of the necessity of deciding appeals from election disputes after the conduct of the elections which originally gave rise to the controversy. As a general rule, such cases have been dismissed as moot unless "it is reasonable to expect that the same controversy will recur between these two parties, yet evade meaningful judicial review." *Meyer v. Grant*, 486 U.S. 414, 417 n.2 (1988), citing *First National Bank v. Bellotti*, 435 U.S. 765, 774-75 (1978), and *Moore v. Ogilvie*, 394 U.S. 814 (1969). While the proper application of this principle has been difficult to discern in particular circumstances, it seems clear that, where an election is over and the claimed violations are not likely to recur, the appeal should be dismissed.

The difference between the two classes of election disputes is aptly illustrated by *Illinois State Board of Elections v.*

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appreciation of human nature to suppose that Members of Congress would have wished to encourage expedited appeals from court orders permitting them to run for re-election in the districts from which they had already been elected.

Socialist Workers Party, 440 U.S. 173 (1979). The Party had sued the State Board and the Chicago Board of Elections to invalidate an Illinois Statutory scheme which required a qualifying petition bearing signatures of 5% of those who voted at the previous election for local offices in Chicago even though petitions for statewide elections required only 25,000 signatures. The district court found the distinction irrational, and "permanently enjoined the enforcement of the 5% provision insofar as it mandated more than 25,000 signatures, the number required for statewide elections." *Id.*, at 179. The Court also approved a settlement between the Party and the Chicago Board, applicable only to the special mayoral election of 1977, which reduced the signature requirement to 20,000 and extended the filing deadline. Id., at 180. The State Board appealed the permanent injunction on its merits and challenged the authority of the Chicago Board to enter into the settlement regarding the 1977 election. After the election was held, the Seventh Circuit affirmed the permanent injunction and dismissed as moot the State Board's challenge to the Chicago Board's authority. *Id.*

This Court affirmed the granting of permanent relief and affirmed the finding that the appeal from the special provisions for the 1977 election was moot. It rejected the State Board's argument that the dispute was "capable of repetition, yet evading review," within the meaning of *Southern Pacific Terminal Co. v. ICC*, 219 U.S. 498, 515 (1911). The Court reasoned:

> In *Weinstein v. Bradford*, 423 U.S. 147, 149 (1975), we elaborated on this exception, holding that a case is not moot when:
>
> > (1) the challenged action was in its duration too short to be fully litigated prior to its cessation or

> expiration, and (2) there was a reasonable expectation that the same complaining party would be subjected to the same action again.
>
> Although the first branch of the test is satisfied here, appellant has presented no evidence creating a reasonable expectation that the Chicago Board will repeat its purportedly unauthorized actions in subsequent elections.... The Chicago Board's entry into a settlement agreement reflected neither a policy it had determined to continue . . . nor even a consistent pattern of behavior .... (citations omitted).

440 U.S. at 187-88. *Accord*, *Hall v. Beals*, 396 U.S. 45, 48 (1969).[6]

Appellants' appeal from paragraph 5 of the District Court's August 2 order, J.S. App. 6-7, as modified by its August 30 order, J.S. App. 56, as set forth in Argument III of their Jurisdictional Statement, is plainly moot under the rule of *Illinois State Board of Elections*. Paragraph 5 altered certain election procedures because of the court's extension of the qualifying deadline, leaving less than the usual period of time to prepare for the conduct of the election. Even if appellants were correct in their assertion that paragraph 5 reflects the

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[6] This rule has been consistently followed by the courts of appeals to dismiss appeals concerning claims peculiar to past elections which are not likely to be repeated. *See, e.g., McCrary v. Poythress*, 638 F.2d 1308, 1310 & n.1 (5th Cir. 1981) (affirming finding of mootness where "the defendants had conceded an error and abandoned the request for the reports" under the Georgia Campaign and Financial Disclosure Act); *Dean v. Austin*, 602 F.2d 121, 124 (6th Cir. 1979) (dismissing appeal as moot where "Michigan election officials may have made mistakes in the instructions pertaining to" the casting of ballots for minority parties, but "there is no reason to believe from this record that any inadequacy of the ballot instructions in 1978 will be repeated in future elections").

policy choices of defendants, J.S. 21, there is no indication that it reflects "a policy [defendants] had determined to continue" or "even a consistent pattern of behavior." *Illinois State Board of Elections, supra,* 440 U.S. 188. Paragraph 5 was enforced only in the September 17 first primary; it was not enforced in the October 8 second primary, nor will it be enforced in the November 5 general election or any general election thereafter. Appellants' appeal from paragraph 5 must therefore be dismissed as moot.

In Arguments I and II of their Jurisdictional Statement, appellants argue that the district court's decision to permit the 1991 election to be conducted under existing law violates the one-person-one-vote principle of the Fourteenth Amendment and "results in a denial or abridgement of the right . . . to vote on account of race or color" in violation of § 2 of the Voting rights Act, 42 U.S.C. § 1973. Whatever the merits of these claims, it is not "reasonable to expect that the same controversy will recur between these two parties, yet evade meaningful judicial review." *Meyer,* 486 U.S. at 417 n.2. On the contrary, the district court explicitly stated:

> [T]his court is not abdicating its responsibility to enforce the provisions of the Voting Rights Act and the constitutional requirement of one-person, one-vote. Far from it. We have retained jurisdiction of this action. We would not consider -- nor would the parties suggest -- use of the 1982 plan if we were implementing a permanent plan. J.S. App. 51.

Paragraph 3 of the August 2 order makes plain that the next legislative election, whenever it is held, will not be conducted under the same plan:

> 3. Those persons elected to 1991 legislative elections shall hold office until their successors are elected

> under an apportionment plan which complies with the Voting rights Act and the United States and Mississippi Constitutions. That plan will be effected either by (a) a legislative plan, precleared by the United States Attorney General or approved by a three-judge court in the District of Columbia, 42 U.S.C. §1973c, or (b) ordered by this court. J.S. App. 5.

The district court's recognition that "the legislative districts under the 1982 plan are undoubtless unconstitutionally malapportioned for a full four-year term of office," J.S. App. 50, makes plain that the next election will be held as soon as an acceptable plan can be devised. Indeed, paragraph 4 of the August 2 order, J.S. App. 5-6, commits the district court to begin work on such a plan on February 14, 1992.

Both of the first two questions presented for review by appellants, J.S. i, ask this Court only to address the standards for "interim" orders in redistricting cases. However, the interim order which appellants seek to appeal has already done its work, and the district court has announced its intention to enter a permanent order at an early date. There is no reason in this world for this Court to expend its energy expounding upon interim orders, when the election governed by this interim order has already been held, and no other interim orders are contemplated by the district court. The constitutional and statutory arguments which appellants seek to adjudicate may more properly be presented upon appeal from the permanent injunction forthcoming from the district court, should they be dissatisfied with the result.

Because only this appeal, and not appellants' complaint for permanent injunctive relief, has become moot, there is no need to vacate the orders of August 2 and 30. As the Seventh Circuit has explained in a similar situation:

> As a general rule, when a case becomes moot on appeal, the district court's decision is vacated in order to make sure that a decision that the loser was unable to get appellate review of does not have res judicata or collateral estoppel effect in subsequent litigation between the parties.... This case is different, however, in that the case has not become moot -- only one order in the case has become moot, the preliminary injunction under appeal -- and in such cases the usual practice is just to dismiss the appeal as moot and not vacate the order appealed from.... A preliminary injunction has no preclusive effect -- no formal effect at all -- on the judge's decision whether to issue a permanent injunction.
>
> *Gjertsen v. Board of Election Commissioners*, 751 F.2d 199, 202 (7th Cir. 1984).

Because a vacation of the district court's orders of August 2 and 30 would have no practical effect whatsoever, this Court should simply dismiss appellants' appeal.

II. IN THE ALTERNATIVE, THIS COURT SHOULD AFFIRM THE ORDERS OF THE DISTRICT COURT.

A. Standard of Review

In considering the merits of appellants' contentions on appeal, this Court must keep in mind the standard of review of interlocutory appeals under §1253. In *Brown v. Chote*, 411 U.S. 452 (1973), a three-judge district court had granted a preliminary injunction requiring the State of California to place plaintiff on the ballot for a seat in Congress, notwithstanding his failure to pay the filing fee. Considering the appeal from that preliminary injunction, this Court stated:

> In reviewing such interlocutory relief, this Court may only consider whether issuance of the injunction constituted an abuse of discretion. *Alabama v. United States*, 279 U.S. 229 (1929); *United States v. Corrick*, 298 U.S. 435 (1936); *United Fuel Gas Co. v. Public Service Comm'n of West Virginia*, 278 U.S. 322 (1929); *National Fire Insurance Co. of Hartford v. Thompson*, 281 U.S. 331 (1930).
>
> 411 U.S. at 457.

The same standard of review applies where a preliminary injunction is denied; except for *Corrick, supra,* each of the cases cited by this Court as authority in *Brown* involved the denial of a preliminary injunction. Moreover, as the Fifth Circuit has noted, "The abuse of discretion standard is as applicable in civil rights cases as in any other . . . ." *Allen v. Mississippi Comm'n of Law Enforcement,* 424 F.2d 285, 290 (5th Cir. 1970).

It is not enough for an appellant to show that he may be entitled to relief on the merits. As this Court said in *Alabama v. United States, supra,* "the duty of this court, therefore, upon an appeal from such an order, at least generally, is not to decide the merits, but simply to determine whether the discretion of the court below has been abused." 279 U.S. at 231. In evaluating the district court's exercise of its discretion, it is appropriate to consider the public interest, even where the appellants will undisputably prevail on the merits.

Here, the district court properly took the public interest into account. As the district court explained:

> If the 1982 plan can be used, its use will help alleviate voter confusion, help to insure adequate time to

> prepare for the elections, and otherwise enhance those elections. For example, if under a plan other than the 1982 plan, a voter does not know where the polling place is for the elections, it is quite conceivable that the voter will arrive to vote at the wrong polling place at or about the time the polls are closing, only to find that under the new, short-lived plan, he or she is to vote at another place, with the result that time does not permit doing so. Elections are for the voters; it is their opportunity to elect their representatives in the Mississippi Legislature. This court finds that its concerns about the otherwise unacceptable population deviations in certain districts under the 1982 plan are far outweighed by the benefits to the voters in these elections. J. S. App. 43.

Whatever the merit of appellants' claims, the district court did not abuse its discretion in finding them to be outweighed by its articulated consideration of the public interest. Its orders should therefore be affirmed.

B. In The Face Of Imminent Elections And In The Absence Of An Enforceable Legislative Reapportionment Plan, The District Court Correctly Permitted Interim Legislative Elections For A Limited Term Of Office To Proceed Under An Existing Malapportioned Plan.

This Court has repeatedly authorized district courts to utilize their equitable powers to permit elections to be held under existing plans which did not comport with constitutional or legal requirements when district courts, such as here, were faced with exigent circumstances, impending elections, and

the absence of an acceptable alternative plan. *Upham v. Seamon*, 456 U.S. 37 (1982); *Bullock v. Weiser*, 404 U.S. 1065 (1972); *Whitcomb v. Chavis*, 396 U.S. 1055 (1972); Ely v. Klahr, 403 U.S. 108 (1971); *Reynolds v. Sims*, 377 U.S. 533 (1964).[7]

The district court, following the teachings of this Court, stated:

> [T]his court both finds, as a matter of fact, and holds as a matter of law, that none of the plans submitted by the parties can be utilized for the 1991 legislative elections. Furthermore, there is insufficient time for this court to prepare and adopt its own plan and still hold the 1991 legislative elections. J.S. App. 4[8]

The district court recognized that utilization of the 1982 plan for the 1991 elections resulted in total population deviations that were unacceptable, J.S. App. 44. However, the district court found that "the deviations in most districts are acceptable, especially for this interim election." J.S. App. 43. Relying on *Chapman v. Meier*, 420 U.S. 1, 24 (1975), the district court concluded that the facts present in this case presented acceptable considerations that would justify an election under a plan that deviated from the one-person, one-vote requirements. J.S. App. 45.

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[7] The district court noted that "[t]he situation facing this Court is analogous to that in *Ely*." J.S. App. 41.

[8] Because the entire 1991 plan did not receive § 5 approval, J.S. App. 158, the legislative plan in existence prior to the 1991 plan continued as the state's legislative apportionment plan, i.e. the 1982 plan. The 1982 plan received § 5 approval and became effective on November 2, 1982. By leaving that plan temporarily in place the district court deferred to state policy, as much as possible, as *Upham v. Seamon*, 456 U.S. 37, requires.

The district court specifically found that "the legislative districts under the 1982 plan are doubtless unconstitutionally malapportioned for a full four-year term of office," J.S. App. 50; required the parties to submit nominees for a special master by February 14, 1992, J.S. App. 27; and set a status conference for March 2, 1992, J.S. App. 27. Clearly, the district court intends to promptly establish "an apportionment plan which complies with the Voting Rights Act and the United States and Mississippi Constitution." J.S. App. 51.

Relying upon the equitable discretion recognized by this Court in *Reynolds v. Sims, supra,* and *Ely v. Klahr, supra,* J.S. App. 31-41, the district court, exercising its equitable powers, J.S. App. 50, permitted the legislative elections to proceed under the existing 1982 plan. Appellants have not submitted a substantial issue and have not demonstrated any abuse of discretion by the district court. *Brown v. Chote, supra.*

C. Appellants Are Not Entitled To A Preliminary Injunction Under Section 2 Of The Voting Rights Act Unless They Satisfy The Elements For A Preliminary Injunction.

The district court did not hold, as appellants contend, "that §2 of the Voting Rights Act does not apply to interim court-adopted or court-approved apportionment schemes", J.S. 20. The district court did, however, find that appellants did "not satisfy the test for preliminary relief," J.S. App. 46.

The interim relief granted below was not a court ordered plan, but merely was an equitable determination by the lower court that the current legislative plan, *i.e.* the 1982 plan, would be utilized for the 1991 scheduled legislative elections. The

appellants in the district court sought a preliminary injunction under Section 2 of the Voting Rights Act to enjoin the 1991 elections from being conducted under the 1982 plan. The lower court denied their motion,[9] and held:

> [W]e need not reach the issue of the 1982 plan's invalidity under §2, because we are utilizing the 1982 plan only for interim relief, pending adoption of a plan that meets the requirements of the Constitution and the Voting Rights Act. We hold that because this Court is not adopting, or utilizing, the 1982 plan as a permanent plan but for an interim period, plaintiffs do not satisfy the test for preliminary relief. (footnote omitted) J.S. App. 45-46.

In the footnote to the above comments, the district court cited the case of *Chisom v. Roemer,* 853 F.2d 1186 (5th Cir. 1988) for the proposition that even if a § 2 violation is proven, it does not follow that irreparable injury has been suffered, because the availability of corrective relief at a later date exists.[10]

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[9] Appellants offered no proof below that the current (1982) apportionment plan was adopted or maintained with the intent to discriminate against minority voters. *Mobile v. Bolden,* 446 U.S. 55(1980). In fact, this was the first time a §2 or any other type of challenge has been made to the 1982 apportionment plan.

[10] The appellants also failed to prove a substantial likelihood of prevailing on the merits. *Thornburg v. Gingles,* 478 U.S. 30, 59 n.28 (1986) emphasized that "when considering several specific vote dilution claims in a single case, courts must not rely on data aggregated from all the challenged districts in concluding that racially polarized voting exists in each district." The testimony of appellants' witnesses concerning the three part test for §2(b), *inter alia,* Dr. Lichtman, J.S. App. 92-121, and Henry Kirksey, J.S. App. 137-139, was not "district specific" but was based "on data aggregated from . . . the challenged districts". Specific proof is required to establish political cohesiveness; just because racial polariza-

Appellants have not and cannot demonstrate irreparable harm. The district court fashioned interim relief for the 1991 legislative elections and made it extremely clear that its use of the 1982 plan would be "doubtless(ly) unconstitutionally malapportioned for a full four-year term of office". J.S. App. 50. However, the district court retained jurisdiction of this matter, established dates for the parties to submit nominees for the appointment of a special master, and set a status conference for March 2, 1992. J.S. App. 27. Beyond peradventure, it is clear that the district court has charted an expeditious course for creating a permanent legislative apportionment plan and will require special legislative elections under a permanent plan that satisfies "the Voting Rights Act and the United States and Mississippi Constitutions." J.S. App. 51. "'The possibility that . . . other corrective relief will be available at a later date, in the ordinary course of litigation, weighs heavily against a claim of irreparable harm.'" *Sampson v. Murray*, 415 U.S. 61, 70 (1974) (quoting *Virginia Petroleum Jobbers Ass'n v. FPC*, 104 U.S. App. D.C. 106, 110, 259 F.2d 921, 925 (1958)).

Further, "[o]nly when the threatened harm would impair the court's ability to grant an effective remedy is there really a need for preliminary relief". Wright & Miller, *Federal Practice and Procedure* § 2948 at 431-34 (1973). Appellants have not demonstrated how any threatened harm would preclude the district court from ultimately granting an effective permanent remedy. "[B]ecause the district court's plan is only an interim plan and is subject to replacement... the injury to appellants,

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tion in voting has occurred, that is not synonymous with political cohesiveness. *Monroe v. City of Woodville*, 881 F.2d 1327, 1331 (5th Cir.), modified on rehearing 897 F.2d 763 (5th Cir.), *cert. denied*, ___U.S.___, 111 S.Ct. 71 (1990). The proof before the court concerning how "geographically compact" minority single member districts could be drawn, as required by *Thornburg*, 478 U.S. at 50, was also insufficient. J.S. App. 21-22.

if any, will not be irreparable." *Upham v. Seamon,* 456 U.S. 37, 44 (1982).

Clearly, the district court did not rule "that §2 of the Voting Rights Act of 1965 does not apply to interim court- adopted or court-approved apportionment schemes", J.S. 20, as appellants incorrectly suggest to this Court. The plain fact is that appellants did not meet the four part test necessary for a preliminary injunction. The district court did not abuse its discretion, *Brown v. Chote, supra;* this issue is not substantial; and the issue is definitely not of national concern.[11]

D. The Election Changes In The August 2 Order Do Not Reflect Policy Choices Of Elected Representatives.

On August 2, 1991, the lower court entered its order establishing the methods by which the September 17 primary elections would be conducted. J.S. App. 2. On August 20, 1991, appellee Democratic Party filed a Motion for Clarification of Order in the lower court to which the appellants objected and filed a Motion for a Preliminary Injunction under §5.

In denying the appellants' Motion for Preliminary Injunction the Court initially noted that appellants:

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[11] Appellants' reliance on *Edge v. Sumter County School District,* 775 F.2d 1509 (11th Cir. 1985), J.S. 16, 19, is misplaced. In Edge, the district court ignored §2 and drew a permanent election plan, while here the district court merely denied a preliminary injunction because appellants failed to meet the necessary criteria. The district court did hold that a permanent plan must comply with the Voting Rights Act. J.S. App. 51.

> at no time prior to the filing by the Democratic Party for Clarification, raised nor even intimated any [§5] objection to the specific terms of the Court's order setting forth the methods by which the primary elections would be conducted. J.S. App. 54, 55.

The district court was further surprised by appellants now challenging the election procedures because:

> [P]laintiffs' counsel, Wilbur Colom, was a primary source of the 'changes' which plaintiffs now challenge. J.S. App. 55.[12]

The three-judge district court then answered the pertinent question as to whether the changes contained in its August 2 order reflect the "policy choice of . . . elected representatives" stating:

> The court's August 2 order provides *interim relief*. The court's determination regarding the necessity of changes in certain election procedures for the purpose of assuring that elections would be conducted in a timely and orderly fashion was based in large part on the testimony of Wayne Parker . . .
>
> * * *
>
> That the parties -- including plaintiffs -- were permitted to make suggestions to the court regarding provisions of the court's order does not suggest the conclusion that the order reflects "policy choices of . . . elected representatives". (emphisis in original). J.S. App. 55.

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[12] See cross-examination of Wayne Parker by Mr. Colom. J.S. App. 134-136.

Only the district court knew if the election changes contained in its August 2 order reflected the "policy choice of . . . elected representatives," and that court answered in the negative.

Clearly, the district court, not the parties, determined what election law changes were necessary, and §5 of the Voting Rights Act is, therefore, not applicable. *McDaniel v. Sanchez,* 452 U.S. 130 (1981).

Assuming for the sake of argument only that paragraph 5 of the August 2 Order is subject to §5 approval, appellees contend that this Court may allow these election changes to be utilized without §5 preclearance.

In *Georgia v. United States,* 411 U.S. 526 (1973), the district court held that §5 preclearance had not been obtained and enjoined the pending election. This Court, however, allowed the election to go forward. After considering the resulting appeal, this Court affirmed the district court but did not invalidate the elections held under the unprecleared plan. *Also see: United States v. County Commission, Hale County,* 425 F.Supp. 433 (S.D. Ala. 1976) (three-judge court), aff'd mem., 430 U.S. 924 (1977) (district court permitted election under an unprecleared plan and directed that those elected would serve provisionally).

In *Clark v. Roemer,* ___ U.S. ___ (1991), 59 U.S.L.W. 4583 (July 3, 1991) this Court indicated that unprecleared election laws could be utilized under certain conditions. The Court stated:

> We need not decide today whether there are cases in which a District Court may deny a §5 plaintiff's motion for injunction and allow an election for an unpre-

> cleared seat to go forward. An extreme circumstance might be present if a seat's unprecleared status is not drawn to the attention of the State until the eve of the election *and there are equitable principles that justify allowing the election to proceed.* (emphasis supplied).
>
> 59 U.S.L.W. at 4585.

In this case "there are equitable principles that justify allowing the elections to proceed" even if the election changes in paragraph 5 of the August 2 Order require §5 preclearance.

Additionally, the election changes contained in the August 2 order do not have any potential for discrimination and are not subject to §5. *Georgia v. United States,* 411 U.S. 526, 534 (1973); *Dougherty County Board of Education v. White,* 439 U.S. 32, 42 (1978). In *NAACP v. Hampton County Election Commission,* 470 U.S. 166 (1985) this Court once again determined that the inquiry confronting local district courts faced with §5 coverage questions was whether such change had the potential for discrimination. In so holding, the Court stated:

> More fundamentally, it is not our province, nor that of the District Court below, to determine whether the changes at issue in this case in fact resulted in impairment of the right to vote, or whether they were intended to have that effect. That task is reserved by statute to the Attorney General or the District Court for the District of Columbia. Our inquiry is limited to whether the challenged alteration has the *potential* for discrimination. The changes effected here did have such *potential* and therefore should have been precleared under §5. (emphasis supplied).
>
> 470 U.S. 166 at 181.

Appellants specifically requested in the district court "that the deadlines regarding absentee balloting should be extended," J.S. App. 76, and appellants' cross-examination of Wayne Parker on July 31 further illustrated appellants' desire to make it easier to vote by absentee ballot. J.S. App. 134-136. Appellants specifically suggested to the district court two modifications of state law concerning absentee ballots, J.S. App. 77, and, these suggestions ultimately appeared in paragraphs 5(b) and 5(c) of the lower court's August 2 order. J.S. App. 6.

It was only when the appellants raised their §5 challenge to the election changes embodied in the August 2 order that they, on August 30, first asserted that "making it easier to vote by absentee ballot would have the potential for discrimination against black voters," J.S. App. 87. Appellants are precluded from making this potential for discrimination argument because of their prior urging that the lower court adopt modifications that would make voting by absentee ballot easier and more accessible to the voters.

The modifications to state election procedures contained in the August 2 order do not have the potential for discrimination and are not subject to §5.

This issue is not substantial, especially considering that the election modifications were only used for the September 17, 1991 primary, and the lower court did not abuse its discretion in modifying election procedures for use only in the September 17 primary. *Brown v. Chote, supra.*

CONCLUSION

For the reasons set forth above, appellees respectfully submit that this Court lacks jurisdiction over this appeal, or, in the alternative, that the questions posed are so unsubstantial

as to require no further argument. Accordingly, appellees request that this appeal be dismissed or that the orders of the district court be summarily affirmed.

Respectfully submitted,
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No. 91-434

In The Supreme Court of the United States
October Term, 1991

HOLLIS WATKINS, ALICE HARDEN, AARON HENRY, EDWARD BLACKMON, JR., SAMUEL McCRAY, JACQUELINE HARPER, BEN F. BURKETT, MAC ARTHUR COTTON, and JOHN QUINCY ADAMS, on behalf of themselves and all others similarly situated,

Appellants,

vs.

RAY MABUS, GOVERNOR OF THE STATE OF MISSISSIPPI, MIKE MOORE, ATTORNEY GENERAL OF THE STATE OF MISSISSIPPI, and DICK MOLPUS, SECRETARY OF STATE OF THE STATE OF MISSISSIPPI, members of the State Board of Election Commissioners, MISSISSIPPI DEMOCRATIC PARTY EXECUTIVE COMMITTEE, and REPUBLICAN PARTY EXECUTIVE COMMITTEE,

Appellees,

and THE STANDING JOINT LEGISLATIVE COMMITTEE ON REAPPORTIONMENT OF THE MISSISSIPPI LEGISLATURE, TIM FORD, in his official capacity as Speaker of the House of Representatives; GLENN S. DeWEESE, in his official capacity as President Pro Tempore of the Mississippi Senate; and THE STANDING COMMITTEE OF APPORTIONMENT AND ELECTIONS OF THE MISSISSIPPI HOUSE OF REPRESENTATIVES,

Appellees-Intervenors.

On Appeal From Decisions Of The Three-Judge Court Of The United States District Court For The Southern District of Mississippi

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ARGUMENT

I. THIS COURT SHOULD NOT DISMISS APPELLANTS' APPEAL

A. Because the Three-Judge District Court's Denial of Injunctive Relief Rested Upon Resolution of the Merits of Appellants' Constitutional Claim and Interwoven Statutory Claims.

Appellees erroneously argue that this Court is without jurisdiction to entertain the instant appeal. [Motion to Dismiss, pp. 8-11]. They rely heavily on this Court's holding in *MTM, Inc., v. Baxley,* 420 U.S. 799 (1975). That reliance is misplaced. In *MTM, Inc.*, a direct appeal was sought from a decision of a three-judge district court that "[w]ithout resolving the constitutional merits of the Complaint . . . dismissed the Complaint without prejudice." *MTM, Inc., v. Baxley*, supra at 800. This Court held that a direct appeal will lie "from the order of a three-judge district court denying interlocutory or permanent injunctive relief only where such order rests upon resolution of the merits of the constitutional claim..." *MTM, Inc., v. Baxley*, supra at 804.

The three-judge district court, in the instant case, resolved the constitutional and interwoven federal statutory (Voting Rights Act) claims adverse to appellants. The three-judge district court specifically held that "it is constitutionally permissible to utilize the 1982 plan in fashioning interim relief. [App. 39 to Juris. Stat.]. The lower court specifically resolved appellants' constitutional claims, and this appeal rests upon that resolution.

In addition to resolving the constitutional issues,

the three-judge district court resolved interwoven statutory issues upon which this appeal rests. The lower court held that "because this court is not adopting, or utilizing, the 1982 plan as a permanent plan[1], but for an interim period, plaintiffs do not satisfy the test for preliminary relief." [App. 45-46 to Juris. Stat.]. Contrary to appellees assertions [2], the only test for preliminary injunctive relief the three-judge district court found appellants had not met was the test of irreparable harm. The district court relied on the Court of Appeals for the Fifth Circuit's decision in *Chisom v. Roemer*, 853 F. 2d 1186 (5th Cir. 1988). This Court, just last term, affirmed a decision of a three-judge district court for the Eastern District of Arkansas, wherein the district court reiterated an earlier holding that "the injury alleged by the plaintiffs is continuing, suffered anew each time a State Representative election is held under the [illegal] structure." *Jeffers v. Clinton*, infra, 730 F. Supp. at 202. The Court of Appeals for the Eleventh Circuit, in *Edge v. Sumter County School Dist.*, 775 F. 2d 1509, 1510 (11th Cir. 1985), held that a "district court could not validly adopt a reapportionment plan without determining whether the plan complied with Section 2 of the Voting Rights Act..." That court, in reaching its

[1]The three-judge district court recognized that the 1982 plan could not pass constitutional muster if it was to be utilized as a permanent plan. [App. 44 to Juris. Stat.]. However, the court held that the unconstitutional plan could be utilized as an interim remedy because, as the lower court erroneously found, the constitutionally acceptable alternative plans were "undesirable." [App. 44 to Juris. Stat.].

[2]Appellees erroneously argue that appellants did not prove: (1) irreparable harm; (2) a substantial likelihood of success on the merits; and (3) that geographically compact single-member districts could be created. Appellants offered unrebutted proof that: (1) 40 House and 13 Senate single-member black majority districts could be created; (3) blacks are politically cohesive; (4) white bloc voting is legally significant; (5) the extent of official discrimination; (6) socioeconomic disparities which adversely affect black voters; and (7) the extent of electoral success by blacks. Appellants proved a prima facie § 2 case. See *Jeffers v. Clinton*, 730 F. Supp. 196 (E. D. Ark. 1989) (three-judge court) *aff'd mem.*, ____ U.S. ____, 111 S. Ct. 662 (1991).

decision, relied on *Jordan v. Winter*, 541 F. Supp. 1135 (N.D. Miss. 1982) (three-judge court), *vacated and remanded, sub. nom. Brooks v. Winter*, 461 U. S. 921 (1983). The *Jordan* Court specifically held that "any plan adopted by this court *as a temporary method of ensuring upcoming elections cannot violate Art. 1, § 2*, the fourteenth amendment, *or the Voting Rights Act.*" *Jordan v. Winter*, supra, 541 F. Supp. at 1142 (emphasis supplied). The *Jordan* Court further held that "such a plan must satisfy the one person, one vote rule and avoid any dilution of minority voting strength." *Id.*, at 1142. The lower court's decision, to the contrary of this settled precedent, in the instant case, has started a disturbing trend at least within the Fifth Circuit. After the lower court rendered its decision, it has been virtually impossible for black and other protected minority voters to secure injunctive relief against apportionment plans that are constitutionally malapportioned and/or dilutive of minority voting strength. Fed. R. Civ. P. 65 has, in voting rights cases, been eviscerated. To settle the divergent views of lower courts, with respect to federal courts obligations to uphold the Voting Rights Act, this Court should note probable jurisdiction. Since the Voting Rights Act claim is so closely interwoven with appellants' constitutional claim, this Court has jurisdiction of those claims. See *Florida Lime & Avocado Growers, Inc. v. Jacobsen*, 362 U.S. 73 (1960).

B. The Instant Action is Not Moot.

Appellees erroneously argue that the instant appeal is moot. They argue that appellants' § 5 claim is moot because the primary elections were conducted on September 17, 1991. However, conducting primary elections in conceded violation of § 5 of the Voting Rights Act does not moot the instant case. Where, as here, unprecleared voting changes are implemented, the federal courts could set aside those elections conducted utilizing the unprecleared changes. See *Perkins v. Matthews*, 400 U. S. 379 (1971); *N.A.A.C.P. v. Hampton County Election Commission*, 470 U. S. 166 (1985);

Berry v. Doles, 438 U. S. 190 (1978); *Clark v. Roemer*, ____ U. S. ____ , 111 S. Ct. 2096 (1991). It is not the conducting of the election, in conceded violation of § 5 of the Voting Rights Act, that would moot appellants' challenge. Only preclearance of the voting change, or not implementing the change during the election, or not holding the election would moot appellants' § 5 challenge. None of the three mooting factors occurred. Therefore, appellants' § 5 claim is not moot, and the instant appeal is not moot.

Concerning appellants' constitutional and § 2 claims, those issues are not moot because the general election has not been held. That election is scheduled for November 5, 1991.[3] The unconstitutionally malapportioned and racially dilutive 1982 plan will be utilized, as ordered by the three-judge district court, for conducting the general election. The issues concerning the use of that plan to conduct the general election raised in this appeal are still alive. Even if the issues became moot while this appeal was pending, the proper course for this Court to follow would be to vacate the lower court's orders and opinions appealed from and to remand the case to the district court with instructions to dismiss the appeal as moot. *United States v. Munsingwear*, 340 U.S. 36 (1950).

II. THIS COURT SHOULD NOT AFFIRM THE ORDERS OF THE DISTRICT COURT

A. Because the District Court Clearly Abused its Discretion.

The three-judge district court clearly abused its discretion by: (1) not enjoining implementaion of unprecleared voting changes; (2) not enjoining utilization of a malapportioned plan as a Court-ordered interim remedy after finding the plan is unconstitutionally malapportioned; and (3) implementing a plan as a Court-ordered interim remedy that clearly violates § 2 of the

[3]Appellants would request that this Court issue an injunction and stay pending appeal to halt the scheduled general election until this Court could hear and decided the questions presented in this appeal.

Voting Rights Act of 1965, as amended.

This Court, just last term, held that § 5's prohibition against implementation of unprecleared changes required the District Court to enjoin the election." *Clark v. Roemer,* supra, 111 S. Ct. at 2102. Appellants, here, put everyone on notice on August 26, 1991 that the district court's August 2, 1991 Order violated § 5 of the Voting Rights Act. Appellees did not seek preclearance of the changes then or thereafter. The district court abused its discretion in not enjoining the unprecleared voting changes with respect to the September 17, 1991 partisan primary elections.

And, this Court has held that "a court-ordered reapportionment plan of a state legislature ...must ordinarily achieve the goal of population equality with little more than de minimis variation." *Connor v. Finch,* 431 U. S. 407, 414 (1977). Court-ordered reapportionment plans must also comply with the requirements of § 2 of the Voting Rights Act. *Edge v. Sumter County School Dist.*, supra at 1510. These rules must be followed, particularly, when the court itself fashions, implements, or orders a remedy. See *Upham v. Seamon,* 456 U. S. 37, 43 (1982); *Jeffers v. Clinton,* supra; *Jordan v. Winter,* supra at 1142; *Edge v. Sumter County School Dist.*, supra at 1510. The lower court abused its discretion by ignoring this clear precedent. And, the district court abused its discretion by ignoring Mississippi State policy concerning reapportionment. The State Legislature had adopted, as policy, criteria that no reapportionment plan exceed 10% deviation and no reapportionment plan dilute minority voting strength. This Court has instructed lower courts to follow state policy, in fashioning remedies, especially when those policies do not conflict with the United States Constituion or federal statutory law. See *Upham v. Seamon,* supra; *Chapman v. Meier,* 420 U. S. 1 (1975); *Swann v. Adams*, 385 U.S. 440 (1967). The lower court, in the instant case, exceeded the parameters set by this Court in ordering or fashioning interim remedies. It was a clear abuse of discretion for the lower court to do so, especially when constitutionally and statutorily alternatives which followed state policy was presented to the court. See *Connor v. Finch,* supra.

B. Appellants are Entitled to a Preliminary Injunction Under § 2 of the Voting Rights Act

The three-judge district court should not have ordered, as a court-ordered interim remedy, a plan that clearly violates § 2 of the Voting Rights Act of 1965, as amended, 42 U.S.C 1973. See *Edge v. Sumter County School Dist.*, supra; *Jeffers v. Clinton,* supra; *Upham v. Seamon,* supra. As such, appellants were entitled to an injunction prohibiting the implementation of the racially dilutive plan as a court-ordered plan.

C. The Election Law Changes Contained in the District Court's August 2, 1991 Order Reflect Policy Choices of the Elected Representatives of the People.

Voting changes recommended by political parties to a district court and subsequently adopted and implemented by the district court without alteration are subject to § 5 scrutiny. See *Berry v. Doles,* supra; *Dougherty County Board of Educ. v. White,* 439 U. S. 32 (1978); *Hathorn v. Lovorn,* 457 U. S. 255 (1982); *McDaniel v. Sanchez,* 452 U. S. 130 (1981). Those changes, having the potential for discrimination, must receive § 5 preclearance prior to being implemented. *Perkins v. Matthews,* supra. (See Juris. Stat., p. 12, n. 6 for potential for the discrimination contained in changes drafted by the political parties and recommended to the district court for incorporation into its Order scheduling elections).

There were no exigent circumstances which would have allowed the district court to deny appellants' request for a § 5 injunction. The district court cited candidates spending money and campaigning, voter confusion caused by delaying the elections, and the court's reluctance to order special elections as exigent circumstances for conducting the election under the malapportioned discriminatory plan. All of those agruments were advanced as exigent circumstances by the district court in *Clark v. Roemer,* supra, and this Court rejected them. The Court should, again, reject such unpersuasive arguments.

CONCLUSION

On the basis of the foregoing argument and authorities cited, the facts, arguments, and authorities citied in appellants' Jurisdictional Statement, this Court should stay and enjoin the general election scheduled for November 5, 1991, or in the alternative set those elections aside, and note probable jurisdiction and reverse and remand the orders and decisions of the three-judge district court with specific instructions to the district court. Because of issues raised under § 5 of the Voting Rights Act of 1965, 42 U.S.C. § 1973c, this Court should request the views of the United States from the Solicitor General.

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